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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

ERICK A. HERNANDEZ,

Defendant and Appellant.

B285948

(Los Angeles County  
Super. Ct. No. BA451185)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig Richman, Judge. Affirmed as modified.

Mark S. Givens, 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, Assistant Attorney General, Paul M. Roadarmel, Jr. and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Erick Hernandez of second degree murder. Hernandez admitted a prior strike conviction, and he was sentenced to an aggregate term of 36 years to life in state prison. Hernandez contends the trial court erred in declining to strike the prior conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). He also contends the court erred in the calculation of his custody credits. We modify the judgment to correct the award of custody credits and affirm the judgment in all other respects.

### **FACTUAL AND PROCEDURAL BACKGROUND**

In October 2016, Hernandez was employed as a dishwasher at the Wilshire Country Club (the Club). He had been in the position for 10 months. In addition to washing dishes, Hernandez would often assist with food preparation.

On October 16, 2016, Hernandez had an argument with another Club employee, Emmanuel Bravo, about use of the employee locker room. Hernandez reported the incident to a manager the next day.

On October 20, 2016, Hernandez had another confrontation with Bravo. Hernandez followed Bravo through the Club kitchen, shouting that Bravo was harassing him. Hernandez aggressively walked towards Bravo and appeared ready to push him, but was restrained by a manager. Bravo complained loudly to other employees that Hernandez had pushed him, and Bravo threatened to report the incident to human resources. Hernandez was nearby and appeared angry.

Later that evening, Bravo chased after Hernandez, apparently believing Hernandez had taken his phone. Bravo turned his back to Hernandez, at which point Hernandez pulled a large kitchen knife from his waistband and stabbed Bravo.

Bravo ran away yelling that he had been stabbed, and Hernandez pursued him while swinging the knife back and forth. Bravo fell to the ground and Hernandez stood over him with the knife. Three other employees tackled Hernandez and forced the knife out of his hand. Hernandez said, “Fuck this. I’m out of here,” and ran away.

An autopsy revealed Bravo suffered a fatal wound to his back, which was seven inches deep and injured his liver, stomach, diaphragm, lung, and heart. Bravo also suffered sharp force injuries and cut abrasions to his lower lip, left arm, right shoulder, right ankle, and face.

Hernandez was charged by information with one count of first degree murder (Pen. Code, § 187, subd. (a)).<sup>1</sup> The information also alleged he personally used a dangerous and deadly weapon during the commission of the offense (§ 12022, subd. (b)(1)). It further alleged that Hernandez suffered a prior conviction for first degree burglary (§ 459), which is a serious felony (§ 667, subd. (a)(1)) and a strike offense (§§ 667, subds. (b)–(j); 1170.12).

The case was tried to a jury, and the prosecution presented evidence establishing the facts summarized above. Hernandez testified in his own defense. According to Hernandez, on the day of the incident, he was watching television in the breakroom when Bravo confronted him. Bravo switched off the television, challenged Hernandez to a fight, and called Hernandez a “little bitch,” a “little fucking snitch,” and a “no-good fucking dishwasher.” Bravo turned off the breakroom lights and left the room. Hernandez reported the incident to a manager.

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

Later that evening, Bravo stepped in front of Hernandez as he was headed to a storage room. Bravo pushed Hernandez, causing him to fall into a dish rack. Bravo started choking Hernandez, and Hernandez feared for his life.

Hernandez then pulled a kitchen knife from his waist and lunged at Bravo. Bravo ran away and Hernandez followed him. Hernandez explained that he was disoriented and did not realize he was chasing Bravo or that he had a knife in his hand. He denied swinging the knife wildly. Hernandez eventually panicked and fled.

The jury found Hernandez not guilty of first degree murder, but convicted him of second degree murder. The jury found true the allegation that Hernandez personally used a deadly and dangerous weapon, and Hernandez admitted the prior conviction allegations.

After denying Hernandez's *Romero* motion, the trial court sentenced him to 36 years to life in state prison, calculated as follows: 15 years to life for second degree murder, doubled because of the prior strike conviction, plus one year for the weapon enhancement and five years for the prior serious felony conviction. The court imposed various fines and fees, and awarded Hernandez 360 days of custody credit.

Hernandez timely appealed.

## **DISCUSSION**

### **I. The Trial Court Did Not Abuse its Discretion in Declining to Strike the Prior Conviction**

Hernandez asserts the trial court erred in declining to strike his prior first degree burglary conviction. We disagree.

### **A. Background**

Prior to sentencing, Hernandez filed a *Romero* motion requesting that the court strike his prior burglary conviction. Hernandez argued that, even without the strike, he would face a significant sentence of up to 21 years to life in prison. He further asserted the burglary was non-violent, explaining that he had broken into his ex-wife's residence, stolen a laptop, and then demanded money for its return. In addition, Hernandez argued there were mitigating circumstances for the murder because the evidence showed he was provoked and acted in self-defense. The People filed a brief in opposition, arguing that Hernandez devoted his life to criminal behavior and falls within the spirit of the Three Strikes law.

At the hearing to consider the motion, the parties submitted on their written briefs. The trial court declined to strike the conviction, stating: "I do agree with the People in this particular instance . . . . For me to strike the strike prior conviction under the circumstances of this case—the strike prior conviction is not that old, and we do have the conviction on this particular case—it would be an abuse of my discretion . . . ."

### **B. Discussion**

In *Romero*, the California Supreme Court held that the Three Strikes law did not remove a sentencing court's discretion to dismiss a defendant's prior strike to achieve a punishment in the furtherance of justice. (*Romero, supra*, 13 Cal.4th at p. 504.) In determining whether to strike a prior conviction, a 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 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 (*Williams*)].)" (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

We review the trial court's ruling for an abuse of discretion. " '[I]t is not enough to show that reasonable people might disagree about whether to strike one or more' prior conviction allegations. [Citation.] Where the record is silent [citation], or '[w]here 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, even if we might have ruled differently in the first instance' [citation]. 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. Of course, in such an extraordinary case—where the relevant factors described in *Williams, supra*, 17 Cal.4th 148, manifestly support the striking of a prior conviction and no reasonable minds could differ—the failure to strike would constitute an abuse of discretion." (*People v. Carmony, supra*, 33 Cal.4th at p. 378.)

There were no such extraordinary circumstances in this case.<sup>2</sup> Although Hernandez insists he is not a career criminal, the record indicates he has a significant, albeit relatively short, history of criminal behavior. According to the probation report, Hernandez suffered a juvenile adjudication in 2004 for battery against a person involving great bodily injury (§ 243, subd. (d)). Five years later, he was convicted of first degree residential burglary. Although the burglary was non-violent, Hernandez's actions nonetheless presented a serious risk to the safety of others and constituted a severe intrusion of the victim's privacy. (See *People v. Fond* (1999) 71 Cal.App.4th 127, 131 ["burglary of an inhabited dwelling is more serious than other types of burglaries because it violates the victim's need to feel secure from personal attack"]; *People v. Hughes* (2002) 27 Cal.4th 287, 355.) Moreover, we do not agree with Hernandez's apparent suggestion that because the victim was his ex-wife, the offense is any less serious.

Four years after he was released from custody for the burglary conviction, Hernandez committed the present, incredibly violent offense. Hernandez insists there are significant mitigating circumstances for the murder. Specifically, he claims he was not the aggressor, was the victim of bullying, and cooperated with the police. In support, however, he relies

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<sup>2</sup> Hernandez argues in his reply brief that the trial court erroneously believed it did not have discretion to strike the prior conviction, as evidenced by the court's remark that it would "be an abuse of my discretion" to strike the conviction. Read in context, however, the court's statement clearly indicates it was aware it had discretion to strike the conviction, but felt it would be improper to do so under the circumstances of this case. (See *People v. Zichwic* (2001) 94 Cal.App.4th 944, 959–961.)

primarily on his own testimony and ignores significant evidence painting a very different picture of the offense. In addition, Hernandez ignores or minimizes the substantial evidence presented at trial that he intentionally stabbed Bravo in the back and chased after him with a knife. Hernandez then continued the attack, even after Bravo had fallen to the ground and suffered numerous wounds. When he was finally subdued, Hernandez showed no remorse and fled the scene. Although Hernandez testified that Bravo had choked him, there was no other evidence corroborating his claims. Moreover, by convicting Hernandez of murder, the jury clearly disbelieved his version of events; the trial court was free to do the same.

Hernandez further contends the particulars of his background, character, and prospects weigh in favor of striking the conviction. In support, he points to evidence that he worked at the Club for 10 months, during which time he had been given additional responsibilities. Initially, Hernandez forfeited this claim by failing to direct the trial court to such evidence in connection with his *Romero* motion. (*People v. Lee* (2008) 161 Cal.App.4th 124, 131 [“unless the defendant presents evidence in support of his request, he forfeits his right to complain that the court’s denial of *Romero* relief did not take into account that evidence”].) Even setting aside the forfeiture, we do not find Hernandez’s 10-month employment history such an overwhelming factor that it would necessarily render him outside the spirit of the Three Strikes law.

Finally, the fact that Hernandez faced a significant prison sentence even without the prior strike is not helpful to him. On appeal, we do not determine if an alternative sentence could be found appropriate. Instead, we review the actual sentence to



determine if the court abused its discretion by imposing it. For the reasons discussed above, we find no abuse of discretion here.

## **II. Hernandez is Entitled to an Additional Day of Custody Credit**

Hernandez contends, and the Attorney General concedes, that the trial court erroneously awarded him 360, rather than 361, days of custody credit. We agree. A defendant is entitled to credit against a term of imprisonment for days spent in custody before sentencing, which includes the day of arrest and day of sentencing. (§ 2900.5, subd. (a); *People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48.) Hernandez was arrested on October 21, 2016, and sentenced on October 16, 2017. Accordingly, he is entitled to 361 days of custody credit.

### **DISPOSITION**

We amend the judgment to award Hernandez 361, rather than 360, days of custody credit. The trial court is directed to prepare an amended abstract of judgment consistent with this modification, and forward a certified copy of the amended abstract of judgment to the Department of Corrections. In all other respects, the judgment is affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

DUNNING, J.\*

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