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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.

GALLAGHER DANIEL
PERSSON,

Defendant and Appellant.

2d Crim. No. B272044
(Super. Ct. No. 14C-42994)
(San Luis Obispo County)

Gallagher Daniel Persson pled no contest to theft from an elder or dependent adult by a caretaker (Pen. Code, § 368, subd. (e)).¹ Persson admitted a prior serious felony conviction within the meaning of the “Three Strikes” law (§§ 667, subds. (d) & (e), 1170.12, subds. (b) & (c)). The trial court sentenced him to four years in state prison.

¹ Further unspecified statutory references are to the Penal Code.

Persson contends the trial court erred when it denied his motion to dismiss his prior strike conviction under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). He also contends, and the People concede, that the trial court erred in imposing a protective order.

We strike the protective order but otherwise affirm.

FACTS

From October 2013 to October 2014, Persson worked as an in-home caretaker for an elderly couple. During his employment, Persson stole over \$100,000 worth of gold and silver coins and heirlooms from the couple's home. He sold some items to pawn shops, and received at least \$47,000 from these sales.

DISCUSSION

Romero Motion

Persson contends the trial court abused its discretion in denying his *Romero* motion because he “fell outside the spirit of the Three Strikes Law.” We disagree.

A trial court has discretion to strike a prior conviction for sentencing purposes if the defendant falls outside the spirit of the Three Strikes law. (§ 1385; *Romero, supra*, 13 Cal.4th at pp. 529-530.) The trial court “must consider whether, in light of the nature and circumstances of [the defendant's] 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.)

A denial of a *Romero* motion is an abuse of discretion only in “limited circumstances” where a court was unaware of its

discretion or considered impermissible factors. (*People v. Carmony* (2004) 33 Cal.4th 367, 378 (*Carmony*).) In the absence of such a showing, we presume the court acted to achieve legitimate sentencing objectives and will not set aside its discretionary determination. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

Persson's prior strike occurred in 1999 after he broke into a neighbor's home and stole jewelry. He was convicted of first degree residential burglary (§ 459). Less than a year later, while he was on probation, Persson stole cash from his employer. He pled no contest to grand theft and commercial burglary (§§ 487, 459).

Persson claims that he "fell outside the spirit of the Three Strikes Law" because his prior strike occurred more than 14 years before the current offense and when he was an "immature" teenager who "eventually ended up in foster care." Persson also notes that his criminal record is limited and nonviolent. Although he committed grand theft and commercial burglary a year after he committed his prior strike, he otherwise remained "crime free" until the current offense.

The record shows that the court weighed the fact that a long time had lapsed since his strike offense, but found other considerations outweighed this factor. The court observed that the strike and current offenses involved theft of personal property, and that Persson exhibited a behavioral "theme" of betraying people's trust. For example, in 2000, he stole money from his employer, and in the current case, he stole from people for whom he acted as a caretaker.

The court also considered the serious nature of the current offense. Persson stole items worth a substantial amount

of money, and his crime spanned a period of more than a year. His victims were vulnerable, as they were elderly and relied on him to provide care.

The trial court did not abuse its discretion in finding that the similarities between his prior and current offenses and the seriousness of his crime placed him within the spirit of the Three Strikes law. (*Carmony, supra*, 33 Cal.4th at p. 378.)

Protective Order

The protective order was statutorily unauthorized, as the People concede, and it should be stricken. (See *People v. Ponce* (2009) 173 Cal.App.4th 378, 381-384 [“Where the Legislature authorizes a specific variety of available procedures, the courts should use them and should normally refrain from exercising their inherent powers to invent alternatives”].)

Prior to Persson’s plea, the trial court imposed a protective order under section 136.2. After the plea and during sentencing, the court imposed a “modified” protective order, indicating that it was a “probation condition.” The court did not rely on any statutory authority for the modified protective order.

DISPOSITION

The protective order is stricken. In all other respects, the judgment is affirmed.

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TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Rita Coyne Federman, Judge

Superior Court County of San Luis Obispo

Suzan E. Hier, 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,
Senior Assistant Attorney General, Scott A. Taryle, Supervising
Deputy Attorney General, and Tannaz Kouhpainezhad, Deputy
Attorney General, for Plaintiff and Respondent.