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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DANIEL A. BROWN, Defendant and Appellant.	B240022 (Los Angeles County Super. Ct. No. VA117914)

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas McKnew, Jr., Judge. Affirmed as modified.

Lynette Gladd Moore, 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, Lawrence M. Daniels and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Daniel A. Brown appeals from the judgment following his conviction by jury of two counts of robbery, with the finding that he personally used a firearm during their commission (Pen. Code, §§ 211, 12022.53, subd. (b)),[1] and one count of driving against traffic in order to evade a police pursuit (Veh. Code, § 2800.4). In a separate court trial, he was found to have suffered two prior serious felony convictions within the meaning of the "Three Strikes" law. (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i) & 667, subd. (a).) Defendant was sentenced to a term of 45 years to life. He contends: (1) there is insufficient evidence to support the trial court's true finding as to one of the alleged prior convictions; (2) the trial court abused its discretion by denying his *Romero* motion;[2] and (3) the court was required to stay his sentence for the Vehicle Code violation pursuant to section 654. We agree that defendant's sentence for evading must be stayed. In all other respects, we affirm the judgment.

STATEMENT OF FACTS

On December 16, 2010, Raouf Bechay and Balamoun Gad were working inside the store at a gas station on Rosecrans Avenue in the City of Bellflower. At approximately 9:20 p.m., a man wearing a motorcycle helmet entered the store. Bechay and Gad were unable to see the man's face, as it was covered by the helmet's shield. The man asked for cigarettes. When Gad handed him the cigarettes, Bechay took the money that was proffered and opened the cash register. Bechay gave the man change. The man put the change in his pants pocket and pulled out a gun from the other pocket. He went around the counter, pointed the gun at Bechay and Gad, and told them not to move. He took $20 and keys from Bechay, a wallet that contained cash, an eyeglass case from Gad (Gad tried to discard his wallet, but the man saw it on the floor and picked it up), and approximately $700 to $800 from the register. The man placed the money from the

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[1] All further undesignated statutory references are to the Penal Code.

[2] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

register into his left pants pocket. He walked out of the store and left the location on a motorcycle traveling east toward the City of Norwalk.[3]

Bechay called the police. A deputy sheriff arrived at the gas station and took Bechay's statement. Approximately a half hour later, another deputy arrived and took Bechay and Gad to Norwalk, five to ten minutes away. At that location, Bechay identified his keys. Gad was shown a motorcycle and helmet and recognized them as belonging to the robber. He also identified his eyeglass case and wallet.[4]

At approximately 9:25 p.m. on December 16, Steve Araujo, a uniformed traffic officer with the California Highway Patrol, was in a marked black and white vehicle driving on the northbound 605 Freeway. He received a call of a motorcycle traveling in that area at a high rate of speed. Araujo observed a motorcycle traveling above the speed limit. Using his own speed as a gauge, Araujo estimated that the motorcycle was moving at 90 to 100 miles per hour.

Araujo got in position to conduct a traffic stop and activated the vehicle's overhead emergency lights and siren. He gave the motorcyclist an opportunity to yield and pull over. Instead, as the motorcycle exited the freeway, the rider turned his torso to the rear, looked in the direction of the patrol vehicle, and accelerated away. When it became evident that the motorcycle was not going to pull over, Araujo called for backup units to assist.

Once on surface streets, the motorcycle continued accelerating and began to travel into opposing traffic, nearly colliding with a couple of vehicles. Moving at top speed of 55 to 60 miles per hour, the cyclist failed to stop at the posted signs and eventually entered an alley. As Araujo continued to pursue the motorcycle down the alley, the cyclist dropped the motorcycle, abandoned the vehicle, and scaled a wall to a residential backyard located at 9756 Orr and Day Road. In order to set up a perimeter and

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[3] A video depicting part of the robbery was shown to the jury. Bechay identified a man seen in the video arriving at and leaving the gas station on a motorcycle as the person who robbed him.

[4] At trial, neither Bechay nor Gad recognized defendant.

containment, Araujo broadcast his location and the fact that the suspect had jumped a wall.

The pursuit was recorded by a camera that was in Araujo's patrol vehicle. The jury viewed the video.

Araujo remained in the alley as the perimeter was being set up. He did not pursue the suspect into the yard. He examined the motorcycle in the alley and noted significant blood spatter on its right side and exhaust pipe.

Deputy Jose Pineda responded to the area where the pursuit ended. He observed defendant, who matched the description of the cyclist. Defendant was limping and speaking on a cell phone. When Pineda contacted defendant, defendant was sweating profusely, which was unusual given that it was a cold December night. Pineda asked defendant why he was bleeding and defendant explained that he had been shot.

Araujo received a call that a unit had a suspect detained approximately one block east of where he had seen the cyclist scale the wall. Araujo responded to the location and saw defendant in the custody of deputy sheriffs. Defendant was not wearing the same clothing that Araujo had observed on the rider of the motorcycle. Defendant had a visible gunshot wound to his right leg. At no time during the pursuit did Araujo draw his service weapon.

Later, another deputy brought a motorcycle helmet and pants to Araujo. They were located between the area where Araujo last saw the cyclist and where defendant was detained. Araujo recognized the items as ones worn by the cyclist he had pursued.

The parties stipulated that defendant was the registered owner of the motorcycle Araujo pursued.

Los Angeles County Deputy Sheriff Nicholas Stewart was on patrol on the night of the robbery. He was informed that the suspect was a male on a motorcycle. As Stewart was searching the area in the vicinity of the gas station, he was advised that the California Highway Patrol had terminated a pursuit with a motorcyclist. Upon learning that the motorcycle matched the description of the one used by the robber, Stewart went to the alley where Araujo had last seen the cyclist. Stewart was directed to search a

nearby area. On a walkway that led from the residence at 9726 Orr and Day Road to the street, Stewart found a black shirt and cargo pants. The legs of the pants were covered with fresh blood. Inside the pants, Stewart found a wallet, a set of keys, and approximately $800 to $900 in cash.[5] Another deputy pointed out a motorcycle helmet and eyeglass case that were nearby.[6]

Stewart went to the hospital where defendant was being treated for a gunshot wound. Prior to speaking to him, Stewart advised defendant of his *Miranda* rights.[7] After defendant waived his rights, Stewart questioned him about the robbery. Defendant said, "I don't know what you're talking about." When asked how he received the gunshot wound, defendant replied, "I don't know."[8]

Defendant told a detective that he was riding his motorcycle near his house. He made an illegal U-turn on Telegraph Road and a left onto Orr and Day Road. He noted there were police lights behind him. Knowing that the patrol vehicle was pursuing him, defendant sped away because he did not want to get a ticket. He acknowledged that he left his motorcycle and jumped over a wall behind a residence on Orr and Day Road. Defendant denied that he had been riding on the 605 Freeway or that he had committed a robbery. Based on his review of the video of the pursuit and the robbery, the detective did not believe defendant was being truthful.

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[5] The parties stipulated that in addition to the money in Gad's wallet, $705 was found in the pants pocket.

[6] The helmet and pants were the items shown to Officer Araujo, who recognized them as items worn by the suspect he pursued. The eyeglass case belonged to Gad. The helmet was found in the front yard of the home at 9742 Orr and Day Road and the case was located nearby.

[7] *Miranda v. Arizona* (1966) 384 U.S. 436.

[8] Defendant told another deputy that he was shot by an unknown person with a .22 caliber gun.

DISCUSSION

I. The Evidence Establishes That Defendant Suffered a Felony Conviction for Assault

Following a court trial, defendant was found to have suffered a 1987 conviction for assault with a firearm. (§ 245, subd. (a)(2).) Defendant asserts there is insufficient evidence to support the court's finding that the conviction was a felony. He correctly points out that a violation of section 245, subdivision (a)(2) may be punished as a misdemeanor and argues the evidence presented by the prosecution established that he was going to be placed on probation with the condition that he serve up to one year in the county jail. Defendant suggests that leaves open the possibility that he was sentenced as a misdemeanant. We are not persuaded.

The prosecution submitted a transcript of defendant's plea to the assault charge. Defendant was advised that if he violated the terms of probation, he could receive up to four years in state prison. That would not have been possible if defendant had pled to misdemeanor assault, which carries a maximum sentence of one year in the county jail. Had the sentencing court given defendant a misdemeanor sentence, it would have violated the terms of the plea agreement. In addition, the prosecutor who took the plea asked defendant, "Daniel Brown, to the charge of *felony violation* of Penal Code section 245(a)(2), . . . how do you now plead?" (Italics added.) Defendant responded, "No contest."

Citing *People v. Feyrer* (2010) 48 Cal.4th 426, defendant argues the fact that he pled to a felony does not necessarily mean the offense remained a felony. In *Feyrer*, the Supreme Court held that a plea agreement wherein a defendant pled to a felony did not render a court incapable of later declaring the wobbler offense to be a misdemeanor under section 17, subdivision (b)(3). (*Id.* at p. 444.) Thus, defendant asserts it is possible that a court declared the assault to be a misdemeanor at a later time. Defendant's claim ignores the standard of review. We do not determine whether the evidence established defendant's guilt beyond all possible doubt. Instead, this "court must review the whole

record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The plea transcript provides the necessary substantial evidence to support the trial court's finding that defendant suffered a prior felony conviction for a violation of section 245, subdivision (a)(2).

II. The Trial Court Properly Denied Defendant's *Romero* Motion

Defendant filed a lengthy motion to dismiss his prior strikes, a 1987 conviction for assault with a firearm and a 1992 conviction for voluntary manslaughter. In that motion defendant set forth a number of factors that he believed were relevant: (1) his rehabilitative efforts; (2) statistics demonstrating that offenders in defendant's age group have a dramatically lower recidivism rate; (3) the fact that he was 18 when he pled to the assault charge and was not advised that the conviction could be used to later enhance his sentence; and (4) the court could strike one prior conviction and fashion a lengthy sentence that adequately punished defendant. He contends the court considered only the seriousness of his prior convictions and argues its failure to weigh all of the relevant factors constitutes an abuse of discretion.

At the sentencing hearing, defendant and his wife addressed the court. Ms. Brown asked the court to consider leniency when sentencing her husband. She said defendant was a good father and husband and a hard worker. She stated that defendant was going through some difficult times and was remorseful for his conduct. Ms. Brown lamented that she was unable to help defendant more prior to his commission of the robbery.

Defendant told the court that since his release from prison in 2004, he had every intention of becoming a productive member of society. He said he got a job and did all he could to support his family. When the recession hit, he lost his job and was unable to find work. He became depressed and started using drugs and alcohol. Defendant said the

pressure of events led him to commit his latest crimes and he was sorry for his family and the victims.

The court noted that defendant's prior convictions occurred "some time ago," but found that they and the current offenses were very serious. Prior to imposing sentence, it stated: "I understand he is remorseful. He has a family. I certainly have sympathy, as anyone would, with what his wife has expressed not only here in court but in the letters that she has written to the court, but this case cries out for the imposition of a life sentence."

Defendant correctly observes that we will not disturb the trial court's failure to strike a prior felony conviction absent an abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 378.) He takes issue with the court's alleged failure to consider all of the relevant factors prior to imposing sentence. The record does not support defendant's claim. Defendant assumes the court did not consider all of the factors in his *Romero* motion simply because it did not specifically mention them. However, where the record is silent, we will presume that the trial court correctly applied the law. (*Ibid.*)

Our review of the record amply demonstrates the trial court properly determined that defendant was not outside the scheme of the Three Strikes law. In 1987, defendant was convicted of assault with a firearm. While on probation for that offense, he was convicted of the sale of a controlled substance in 1989. (Health & Saf. Code, § 11352.) Following that crime, defendant was convicted of voluntary manslaughter in 1992 and possession of cocaine base for sale in 1995. We note that defendant could have received a Three Strike sentence in 1995; however, he was sentenced to 13 years. His current crimes were violent, as he placed a number of people at risk of grievous harm at the scene of the robbery and on the road as he fled from the police. Defendant has accumulated four strike priors, two narcotics convictions and one for traveling into oncoming traffic while evading a police pursuit. In addition, he has taken the life of another human being. The trial court's refusal to strike a prior conviction was not arbitrary and does not warrant reversal. (*People v. Carmony, supra*, 33 Cal.4th at p. 377 ["a trial court does not abuse

its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it"].)

The cases upon which defendant relies, *People v. Thimmes* (2006) 138 Cal.App.4th 1207 and *People v. Burgos* (2004) 117 Cal.App.4th 1209, are readily distinguishable. In *Thimmes*, the panel concluded that the defendant's counsel was ineffective by failing to correct the trial court when it erroneously determined that the defendant had been warned of the future consequences of pleading to a violation of section 422. (*Thimmes*, *supra*, 138 Cal.App.4th at pp. 1212-1213.) Here, counsel informed the court that defendant *had not* been advised that his assault conviction could be used to enhance a future sentence and there is no claim of ineffective assistance. In *Burgos*, the trial court's refusal to strike one of the defendant's two strikes where the crimes arose from the same act was deemed to be an abuse of discretion. (*Burgos*, *supra*, 117 Cal.App.4th at pp. 1215-1216.) In the present case, defendant's two prior strikes did not arise from the same act.

We discern no error in the trial court's refusal to strike a prior conviction.

III. Defendant's Sentence for Evading Must Be Stayed

The trial court imposed a concurrent term of 25 years to life for the violation of Vehicle Code section 2800.4. Citing cases holding that the crime of robbery is not complete until the perpetrator has reached a place of temporary safety, defendant argues that he committed the crime of evading while seeking refuge after committing the robbery. As a result, he urges, the crimes were committed during a single, indivisible course of conduct pursuant to one criminal objective and section 654 bars sentence for both.

The Attorney General urges that section 654 does not apply here because defendant's conduct in evading the police was so egregious that his actions cannot be deemed merely incidental to the robbery. In support of her position, she cites *People v. Nguyen* (1988) 204 Cal.App.3d 181. There, the victim of a robbery was taken to a back room, told to lie on the floor, and shot by an accomplice while Nguyen took money from

the store's till. The court found "[t]his act constituted an example of gratuitous violence against a helpless and unresisting victim which has traditionally been viewed as not 'incidental' to robbery for purposes of Penal Code section 654." (*Id.* at 190.)

We find the Attorney General's argument unpersuasive. Egregious or not, it cannot be disputed that defendant's conduct in evading the police was for the express purpose of fleeing from the scene of the robbery he had just committed. As the crime of robbery "is not completed until the robber has won his way to a place of temporary safety (*People v. Irvin* (1991) 230 Cal.App.3d 180, 185), defendant's act of evading the police cannot be deemed merely incidental to the robbery.

There is, however, an exception to the application of section 654. "[T]he limitations of section 654 do not apply to crimes of violence against multiple victims." (*People v. King* (1993) 5 Cal.4th 59, 78.) For purposes of the multiple victim exception in section 654, a crime of violence is "an act of violence against the person, that is, . . . an act of violence committed 'with the intent to harm' or 'by means likely to cause harm' to a person. [Citations.]" (*People v. Hall* (2000) 83 Cal.App.4th 1084, 1089, disapproved on another point by *People v. Correa* (2012) 54 Cal.4th 331, 343-344.) It has long been held that robbery is a crime of violence. (*People v. Deloza* (1998) 18 Cal.4th 585, 592.) The question that remains is whether a violation of Vehicle Code section 2800.4 is a crime of violence for purposes of the multiple victim exception.[9]

Division Six of this District examined whether one act of evading several police officers could result in multiple convictions of Vehicle Code section 2800.2. (*People v. Garcia* (2003) 107 Cal.App.4th 1159.) The panel noted, "'[a] defendant may properly be convicted of multiple counts for multiple victims of a single criminal act only where the act prohibited by the statute is centrally an "act of violence against the person." [Citation.]'" (*Id.* at p. 1163, citing *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 351.) In concluding that the defendant could be convicted of only one count of evading, the

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[9] The parties were given an opportunity to file supplemental briefs regarding this issue.

Garcia panel found that "felony evading, as defined by the Legislature, is not a crime of violence." (*Ibid.*)

We find the reasoning of *Garcia* applicable here. Although we are not concerned with whether defendant may be convicted of multiple counts, the exception to section 654 relating to punishment also relies on whether he committed a crime of violence when he violated Vehicle Code section 2800.4. Although the act of evading the police by traveling into oncoming traffic may have deadly consequences, we conclude that it does not constitute "centrally an 'act of violence against the person.'" (*Wilkoff v. Superior Court, supra*, 38 Cal.3d at p. 351.) For that reason, the sentence for defendant's evading conviction must be stayed. As he received a concurrent sentence for that count, remand is not necessary.

DISPOSITION

Defendant's sentence for violating Vehicle Code section 2800.4 is stayed. In all other respects, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment and to forward a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.