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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ROGER DOUGLAS, Defendant and Appellant.	B279916 (Los Angeles County Super. Ct. No. BA447708)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anne H. Egerton, Judge. Affirmed.

Heather J. Manolakas, 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, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Roger Douglas was convicted of possession of a firearm by a felon, assault with a firearm, and misdemeanor possession of a controlled substance. He contends the judgment of conviction must be reversed due to evidentiary and sentencing error. We reject his contentions and affirm.

RELEVANT PROCEDURAL HISTORY

On July 20, 2016, a six-count information was filed, charging appellant in counts 1 and 2 with the attempted willful, deliberate, and premeditated murder of Nina Hoover and Tracy Parker (Pen. Code, §§ 187, subd. (a), 664), in count 3 with possession of a firearm by a felon (Pen. Code, § 298000, subd. (a)(1)), in counts 4 and 5 with assault with a firearm on Hoover and Parker (Pen. Code, § 245, subd. (a)(2)), and in count six with misdemeanor possession of a controlled substance (Health & Saf. Code, § 11350).[1] Accompanying count 4 were allegations that appellant personally used a firearm (§§ 667.5, subd. (c), 1192.7, subd. (c), 12022.5). The information further alleged that appellant had suffered two prior convictions constituting strikes under the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and serious felony convictions (§ 667.5, subd. (c)). Appellant pleaded not guilty and denied the special allegations.

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[1] All further statutory citations are to the Penal Code unless otherwise indicated.

The trial was bifurcated regarding appellant's prior convictions. Following the prosecution's case-in-chief, the trial court dismissed counts 2 and 5 at the prosecution's request, as Parker -- the victim named in those counts -- failed to appear as a witness. A jury found appellant guilty as charged in counts 3, 4, and 6, and found true the personal gun use allegation accompanying count 4. The jury otherwise found appellant not guilty of the offense charged in count 1. After finding the prior conviction allegations to be true, the trial court denied appellant's motion to strike his strikes (*People v. Romero* (1996) 13 Cal.4th 497 (*Romero*)), and imposed an aggregate sentence of 39 years to life in prison.

FACTS

A. *Prosecution Evidence*

In February 2016, John Davis lived with his girlfriend Nina Hoover in an apartment building in Los Angeles. Also residing with them was Tracy Parker. Davis and Hoover were friends of appellant, who lived in another apartment within the building.

On February 25, 2016, at approximately 10:00 a.m., Davis and Hoover heard appellant banging on their apartment door.[2] After Davis opened the door, appellant

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[2] Our summary of appellant's conduct is based on Davis's and Hoover's post-incident statements, as described by Los Angeles Police Department (LAPD) Officer Julio Garcia. The admissibility of Garcia's testimony regarding
(*Fn. continued on the next page.*)

accused Hoover of being a snitch and lying, then began walking down the hallway to his apartment. When Hoover followed appellant, he pointed a chrome gun toward her mouth, stating, "I'm trying to put it in your mouth to blow your brains out." Appellant then said, "I'm going to shoot your toes off," and fired a gunshot into the floor near Hoover. Hoover left the building and Davis made a 911 call. While Davis was making that call, police officers arrived at the apartment.

The jury heard an audio recording of Davis's 911 call. Davis told the dispatcher that there was a man with a gun in the apartment building hallway. After saying, "[H]e's got a young lady out there. He shot the gun," Davis stated, "[T]hat's my girlfriend out there he got."

On February 25, 2016, at approximately 10:20 a.m., LAPD Officers Julio Garcia and George Gomez responded to a radio call regarding a shooting at appellant's apartment building. When they arrived, a black female at the building door gestured to them and said, "That's him."[3] The officers saw appellant running through the building's hallway, pursued him on foot, and caught him near a gate into a neighboring property. In the apartment building hallway,

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those statements is examined below (see Discussion, pt. A., *post*).

[3] Officer Garcia could not recall whether the female was Hoover or Parker.

the officers found a hole consistent with a gunshot and a box containing a six-shot chrome revolver. The gun contained five rounds and one spent casing. A gun holster was also recovered in the area of the building.

Investigating officers found a bullet fragment in the hallway and a baggie containing a substance resembling rock cocaine in appellant's apartment. Later, the bullet fragment was determined to have been fired from the gun found in the hallway, and the substance in the baggie was identified as cocaine.

B. *Defense Evidence*

Appellant offered no evidence.

DISCUSSION

Appellant contends that testimony regarding Davis's and Hoover's post-incident statements was improperly admitted at trial, and that the trial court erred in denying appellant's motion to strike his prior strikes. For the reasons discussed below, we reject those contentions.

A. *Davis's and Hoover's Post-Incident Statements*

Appellant challenges the trial court's ruling that certain statements by Davis and Hoover to Officer Garcia were properly admitted as prior inconsistent statements. Appellant argues that Garcia's testimony regarding those statements was inadmissible because Davis and Hoover testified that they could not recall making the statements.

1. *Governing Principles*

Under Evidence Code sections 770 and 1235, a witness's prior inconsistent statements may be admitted for impeachment purposes and as substantive evidence, provided the witness is afforded an opportunity to explain them. (*People v. Brown* (1995) 35 Cal.App.4th 1585, 1596-1597.) Such statements need not have been testimony admitted into evidence at a prior hearing. (*People v. Ochoa* (2001) 26 Cal.4th 398, 445, abrogated on another point in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.) When a witness's prior inconsistent statements are properly admitted, the factfinder may credit or reject the version of the pertinent events disclosed by the statements. (*People v. Freeman* (1971) 20 Cal.App.3d 488, 494-495.) The trial court's admission of prior inconsistent statements is reviewed for an abuse of discretion. (*People v. Homick* (2012) 55 Cal.4th 816, 859.)

Here, the key issue is whether Davis's and Hoover's statements to Officer Garcia were inconsistent with their trial testimony, for purposes of Evidence Code sections 770 and 1235. Our Supreme Court has explained that "[n]ormally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. [Citation.] However, courts do not apply this rule mechanically. 'Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness'[s] prior statement [citation], and the same principle governs the case of the

forgetful witness.' [Citation.] When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statements is proper. [Citations]" (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220 (*Johnson*).)

Instructive applications of those principles are found in *People v. Green* (1971) 3 Cal.3d 981 (*Green*) and *People v. Plasencia* (1985) 168 Cal.App.3d 546 (*Plasencia*). In *Green*, the defendant was charged with furnishing marijuana to a minor. (*Green*, *supra*, p. 984.) At trial, the minor in question testified that he had known the defendant for several years, and that during a phone call the defendant offered to sell him some marijuana. (*Id.* at p. 986.) The minor further testified that after the phone call, he found himself in possession of a large quantity of marijuana, but maintained that he could not recall how he acquired it. (*Id.* at pp. 986-987.) The minor ascribed that memory failure to his use of LSD shortly before the phone call. (*Id.* at p. 986.) After finding the minor's purported memory lapse to be an evasion, the trial court permitted the prosecution to present the minor's statements to a police officer and his preliminary hearing testimony that the defendant had supplied him with the marijuana. (*Ibid.*)

Affirming the ruling, the Supreme Court agreed with the trial court's characterization of the purported lapse as

"inherently incredible," stating: "[The minor] admitted . . . that he 'clearly remembered' every event *before* his acquisition of the marijuana, including the highly incriminating phone call by [the] defendant, and every event *after* that acquisition, including his possession the same day of the shopping bag containing . . . marijuana, his consumption of some, his sale of others, and the alleged theft of the remainder." (*Green*, *supra*, 3 Cal.3d at p. 988.)

In *Plasencia*, several members of a gang, including the defendant, approached four men waiting at a bus stop, threatened them with a knife, and robbed them. (*Plasencia*, *supra*, 168 Cal.App.3d at pp. 549-550.) After the police arrested two gang members who participated in the crime, they identified the defendant as another participant. (*Id*. at p. 550.) At the defendant's trial, when the prosecution called the two gang members as witnesses, they claimed lapses of memory and asserted that their pre-trial statements were the product of police coercion. (*Id*. at pp. 550-551, 552.) One testified that he could not recall whether the defendant was among the gang members present at the scene before the attack, and stated that he left before the attack occurred. (*Id*. at p. 550.) The other denied being at the scene altogether, and stated that he could not recall most of the statements he made to the police. (*Id*. at pp. 550-551.)

Affirming the admission of the two gang member's pre-trial statements as inconsistent prior statements, the appellate court stated: "The reluctance of both [gang

members] to testify against [the] defendant was readily apparent, as it was necessary for the trial judge to repeatedly warn them to make their voices more audible. Subsequent testimony established that neither witness was willing to corroborate any prior statement that would implicate a fellow gang member. Although the memories of the witnesses faltered when asked if they recalled the details of the attack or the statements given to the investigating officers, both were able to recount in detail the allegedly coercive tactics of the police and that they were nowhere near the scene when the crime occurred." (*Plasencia*, *supra*, 168 Cal.App.3d at p. 552.)

2. *Underlying Proceedings*

Davis and Hoover were the prosecution's first two witnesses. During their testimony, both denied making certain statements to investigating officers, and stated that they could not recall making other statements to the officers.

Davis testified that for approximately two days preceding February 25, 2016, he and Hoover drank alcohol and used drugs. On the morning of February 25, while in his apartment with Hoover and Parker, he and Hoover used some cocaine. Later, at approximately 10:00 a.m., appellant knocked on Davis's apartment door. After opening the door, Davis talked to appellant. When their conversation ended, appellant left and Davis walked into his bedroom. In the bedroom, Davis heard loud voices in the hall "ma[king] a lot

of noise," and saw Hoover go into the hall. After hearing Hoover's voice and several male voices he did not recognize, followed by what sounded like a gunshot, he made a 911 call. At trial, Davis denied knowing the identity of the "guy with a gun" he mentioned in the 911 call. When police officers arrived at the scene, Davis talked to them.

Davis acknowledged that he told the officers that he heard some banging on his apartment door, saw Hoover walk into the hallway outside the apartment in order to talk to appellant, and later heard a gunshot. Davis denied making other statements to the officers, namely, that Hoover argued with appellant, that Davis saw appellant holding a chrome gun, and that appellant put the gun's barrel in Hoover's mouth. Davis further stated that he could not remember telling the officers that appellant was yelling when he first arrived at the closed apartment door, that Davis opened the door only after advising Hoover not to do so, and that he did not intervene in order to prevent the situation from getting worse.

Hoover testified that the night before the February 25 incident, she and Davis drank alcohol and used drugs. The next morning, Hoover and Davis used some cocaine. Later, while in bed with Davis, Hoover heard Parker arguing with appellant, who was Hoover's friend. The argument occurred in the hallway outside the apartment's door, and appeared to concern the conduct of Parker, whom Hoover characterized as "disruptive." Hoover left her bedroom and went to talk to appellant in the hallway, who waved a "shiny" object

that might have been a small pistol at her, approximately two feet from her face. According to Hoover, because she was intoxicated when she saw the object, she could not state what it was at trial. Upset by appellant's conduct, Hoover left the apartment building and cried. At some point, as she walked away from appellant, she heard a gunshot. After the incident, she spoke to investigating officers.

Hoover stated that she did not remember making certain statements to the officers after the incident, and denied making other statements. She acknowledged telling the officers that the incident began when appellant banged on her apartment door, that Davis opened the door, and that appellant later said that he intended to shoot Hoover's toes off. At trial, Hoover characterized appellant's remark as a joke. However, Hoover stated she could not recall telling the officers that appellant accused her of lying and being a snitch, that appellant threatened to kill her, that she said to appellant, "You want me, I'm here," that appellant put a gun to her mouth, and that after threatening to shoot her toes off, he fired a gunshot into the floor close to her. She also denied telling the officers that appellant had a gun.

Following Davis's and Hoover's testimony, the prosecution called Officer Garcia as a witness. According to Garcia, when interviewed, Davis and Hoover were not incoherent, although he thought it was possible they were under the influence, as both displayed bloodshot eyes and slurred speech.

The prosecutor first examined Officer Garcia regarding his interview of Hoover. At the beginning of that examination, Garcia testified that Hoover described appellant as "very upset" when Davis opened the apartment door. When the prosecutor asked whether Hoover heard appellant call her a snitch and a liar, appellant's counsel objected to Garcia's testimony insofar as it concerned statements that Hoover had not specifically denied. Counsel argued that "[t]here were portions where [Hoover] said she did not recall." The trial court overruled the objection, concluding there was sufficient evidence that "a professed lapse of memory [was] false or evasive." The court further permitted counsel to assert a standing objection to Garcia's testimony relating to Hoover's and Davis's statements.

Officer Garcia then testified that Hoover provided him with the following account of the incident: After appellant accused her of being a snitch and a liar, he walked down the hallway to his apartment. Hoover followed appellant, and said, "You want me, I'm here." Appellant first pointed a gun at her mouth, stating, "I'm trying to put it in your mouth to blow your brains out." Appellant then said, "I'm going to shoot your toes off," and fired one gunshot into the floor close to Hoover.

Officer Garcia further testified that Davis offered the following account of the incident: When appellant banged on Davis's apartment door, he advised Hoover not to open it, and opened it himself. Appellant then yelled at Hoover, who argued with appellant and followed him into the hallway.

After seeing appellant put the barrel of a gun into Hoover's mouth, Davis decided not to intervene in order to prevent escalation of the situation, and instead made a 911 call.

Later, during the sentencing hearing, the trial court observed: "Hoover and [Davis] recanted at the trial. . . . They didn't even have the same story in their later version of what they said happened, and both claimed considerable failures of recollection."

3. *Analysis*

Appellant contends the trial court abused its discretion in admitting Officer Garcia's testimony on the ground that Davis's and Hoover's claimed memory lapses were deliberate evasions.[4] As explained below, we disagree.

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[4] Appellant targets Officer Garcia's testimony regarding the following statements attributed to Hoover: that appellant called Hoover a liar and a snitch; that Hoover approached appellant when he was returning to his apartment and stated, "[y]ou want me, I'm here"; that appellant had a chrome handgun with a black plastic grip; that appellant tried to place it in her mouth; that appellant stated he was going to shoot Hoover in the head; and that appellant fired a shot into the ground near Hoover. Appellant further targets Garcia's testimony regarding the following statements attributed to Davis: that appellant yelled outside the door to Davis's apartment; that Hoover and appellant argued; and that Davis did not intervene because he thought his actions might exacerbate the situation.

The record discloses "a reasonable basis" for the trial court's determination. (*Johnson*, *supra*, 3 Cal.4th at pp. 1219-1220.) Davis's and Hoover's trial testimony established their motive to feign memory failure, as each identified appellant as a good friend. Davis testified that in February 2016, he had a "very good" relationship with appellant, and that he still considered appellant a good friend at the time of the trial. Hoover testified that her nickname for appellant was "Family" because that was "how [she] felt," and that after the incident, he apologized for his conduct during a phone call to her.

Furthermore, at trial, Davis and Hoover gave detailed -- but differing -- accounts of the incident itself, and their memories faltered primarily with respect to certain post-incident occurrences, namely, statements they made to Garcia that incriminated appellant. According to Davis's account of the incident at trial, after appellant knocked on his apartment door, they had a "normal" conversation, and appellant left; later, while Davis was in his room, he saw Hoover leave the apartment, and heard the voices of "more than two" unknown men in the hallway, followed by a gunshot. In contrast, Hoover testified that while in her bedroom with Davis, she heard Parker arguing with appellant; that she went into hallway, where appellant waved an object at her and joked that he intended to shoot her toes off; and that she later heard a gunshot by an unknown shooter. Both denied any recollection of telling Garcia that appellant tried to put a gun in Hoover's mouth

after arguing with her; Hoover further denied telling Garcia that appellant threatened to kill her with a gun and fired a shot into the floor near her. Accordingly, in view of the witnesses' pattern of memory loss and apparent motive to feign that loss, the record discloses a reasonable basis for concluding that they were engaged in deliberate evasion.

Pointing to Davis's and Hoover's testimony that they used alcohol and drugs before the incident, appellant contends their claimed memory lapses reflected only inebriation and sleep deprivation because the lapses did not always concern "inculpatory information." However, the clear tendency of the lapses was to eliminate potential evidence against appellant. In addition to Davis's and Hoover's claimed lapses regarding their statements to Officer Garcia, as described above, Hoover testified that she could not recall whether the object appellant waved at her was a gun. The other claimed lapses were minor in nature and irrelevant to the charges against appellant.[5] In view of the witnesses' selective claimed memory loss, the trial court

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[5] Davis stated that he could not remember what he and appellant discussed when they conversed in Davis's apartment; Hoover stated that she could not recall precisely when she last used cocaine before the incident, how long she and Davis were in bed together before the incident, when Davis left the bed, what she and appellant talked about in the hallway, whether Parker was intoxicated, where Parker was during the incident in the hallway, and whether anyone was outside the building when Hoover left it.

was not compelled to credit their explanation for that loss. (See *Green*, *supra*, 3 Cal.3d at p. 988.) In sum, the trial court did not err in admitting Officer Garcia's testimony under Evidence Code sections 770 and 1235.

B. Romero *Motion*

Appellant contends the trial court erroneously declined to dismiss his prior strikes, namely, his 1989 attempted robbery conviction and 1991 robbery conviction. Under the Three Strikes law, the decision to dismiss or "strike" a prior felony conviction is consigned to the trial court's discretion. (*Romero*, *supra*, 13 Cal.4th at p. 504.) The trial 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 . . . ." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Under these standards, the trial court did not err in denying appellant's motion to dismiss the strikes, in view of his lengthy criminal record and the circumstances of his present crimes. Generally, abuse of discretion in sentencing "is found only where [the trial court's] choice is 'arbitrary or capricious or "'exceeds the bounds of reason, all of the circumstances being considered.'" [Citations.]'" (*People v. Trausch* (1995) 36 Cal.App.4th 1239, 1247, quoting *People v. Welch* (1993) 5 Cal.4th 228, 234.) In denying the *Romero* motion, the trial court concluded that

appellant's criminal history established his "consistent use of guns" -- which it characterized as a "big problem" -- and further found that the facts of his current crimes were "extremely serious." We see no abuse of discretion here.

When sentenced, appellant was 46 years old. As a juvenile, petitions were sustained against him for assault with a deadly weapon, possession of a controlled substance, and possession of a firearm in public. In 1989, when 18, appellant was convicted of attempted robbery and sentenced to 40 months in prison. In 1991, after being placed on parole, he was convicted of misdemeanor possession of a loaded firearm in public. Later that year, he was convicted of robbery and placed on probation. In 1992, his probation was revoked, and he was sentenced to two years in prison. In 1993, he was convicted of possession of a firearm by a felon and sentenced to two years in prison. In 1996, he was convicted of assault with a firearm and sentenced to five years in prison. In 2004, following convictions for possession of a firearm by a felon and possession of a controlled substance, he was sentenced to eighty-eight months in prison. After being released from prison, appellant was convicted of the current offenses, which involved the possession and discharge of a gun.[6]

Appellant challenges the denial of his *Romero* motion, contending the trial court failed to give due weight to

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[6] As the trial court observed, appellant's expected parole date following his 2004 conviction fell in 2010.

several considerations. He argues that the strikes identified by the prosecution occurred in 1989 and 1991, and that his most recent serious or violent felony -- prior to the current convictions -- was his 1996 conviction for assault with a firearm. Additionally, he argues that he manifested acceptance of responsibility for his criminal conduct by entering a guilty plea to the 1996 offense, and that his criminal history reflects a struggle with substance abuse.

In our view, the age of the strikes do not support their dismissal. In *People v. Humphrey* (1997) 58 Cal.App.4th 809, 813, the appellate court held that absent evidence of the defendant's efforts at rehabilitation, the remoteness of a prior conviction is not a proper basis for striking it. There, the trial court struck a 20-year old conviction. (*Id.* at p. 812.) In reversing the ruling, the appellate court stated: "In determining whether a prior conviction is remote, the trial court should not simply consult the Gregorian calendar with blinders on. To be sure, a prior conviction may be stricken if it is remote in time. In criminal law parlance, this is sometimes referred to as 'washing out.' [Citations.] The phrase is apt because it carries the connotation of a crime-free cleansing period of rehabilitation after a defendant has had the opportunity to reflect upon the error of his or her ways. Where . . . the defendant has led a continuous life of crime after the prior, there has been no 'washing out' and there is simply nothing mitigating about a 20-year-old prior." (*Id.* at p. 813.) That is also the case here.

Nor does the gap between appellant's 1996 conviction and his current convictions, or the other considerations he identifies, support the dismissal of the strikes, in view of his 2004 conviction for possession of a firearm as a felon and the gun-related nature of his current convictions. The Three Strikes law "does not require multiple violent felony offenses to come within the statutory scheme." (*People v. Strong* (2001) 87 Cal.App.4th 328, 340, italics omitted.) Appellant's long record of criminal conduct -- including several gun-related felonies -- establishes that he is "'the kind of revolving-door career criminal for whom the Three Strikes law was devised.'" (*Ibid.*, quoting *People v. Gaston* (1999) 74 Cal.App.4th 310, 320.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.