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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER PROPPS, Defendant and Appellant.	B281522 (Los Angeles County Super. Ct. No. NA104701)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jesse I. Rodriguez, Judge. Affirmed.

Brian C. McComas, 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, Noah P. Hill and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Christopher Propps (defendant) of second degree robbery based on evidence he stole a watch, a cellphone, and recyclable cans from victim Jayson Eugenio (Eugenio). We are asked to decide whether the trial court erred in excluding certain trial testimony as hearsay (including aspects of defendant's own testimony); whether the court wrongly permitted the prosecution to impeach defendant's testimony with rather old prior felony convictions; whether the court wrongly denied defendant a pinpoint instruction on eyewitness identification; and whether the Three Strikes law sentence the trial court imposed is too severe—either because the trial court should have granted defendant's *Romero*[1] motion to strike one of his prior convictions or because the sentence imposed is unconstitutionally cruel or unusual.

I. BACKGROUND

A. The Offense Conduct[2]

Eugenio, who suffered from an apparent learning disability, attended special education classes at California State University, Long Beach. When not in school, he at times collected recyclable items from trash cans to make money.

Defendant collected recyclables in the same neighborhood as Eugenio. Both men had previously seen each other around the neighborhood, and defendant claimed to have caught Eugenio

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

[2] We state the facts in the light most favorable to the People. (*People v. Perez* (2010) 50 Cal.4th 222, 229; *People v. Cooper* (1979) 94 Cal.App.3d 672, 676, fn. 2.)

"stealing" recyclables twice during the months leading up to the robbery.

In the evening on July 9, 2016, Eugenio was walking down Martin Luther King Jr. Avenue when a man he later identified as defendant approached him. Eugenio was not wearing glasses. While standing just two to twelve inches away from Eugenio, defendant told Eugenio to hand over his phone and his watch.[3]

Eugenio gave defendant his phone and his watch, plus recyclable cans he had collected, because he was afraid. When defendant left with the items, Eugenio called the police. Long Beach Police Department Officer Alberto Leon responded to the call. Eugenio told Officer Leon the person who took his property was a black man with a short "poofy" or afro hairstyle.

B. Post-Robbery Altercation and Defendant's Arrest

Eugenio continued to see defendant around the neighborhood after defendant took his watch and the other items. At one point, Eugenio encountered defendant in a nearby alley. Defendant warned Eugenio not to come around that area any more.

The next day, Eugenio collected recyclable cans outside a doughnut shop located in the same area of the alley where defendant had confronted him the day before. Defendant, who was inside the doughnut shop, came outside when he saw Eugenio.

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[3] According to Eugenio, defendant was holding a knife when he demanded Eugenio's possessions. Later at trial, the jury found the allegation that defendant was armed during the commission of the robbery not true.

Defendant approached Eugenio and "slapped . . . the shit out of him." The force of the blow was hard, knocking the eyeglasses that Eugenio was wearing at the time to the ground and leaving Eugenio with a small cut on the bridge of his nose. Defendant cursed at Eugenio for taking recyclables out of the trash can and then left the area. Eugenio walked away and called the police.

Officer Benjamin Cobb of the Long Beach Police Department responded to Eugenio's call. After taking Eugenio's statement regarding what happened, Officer Cobb agreed to drop Eugenio off at a nearby 7-Eleven. On the way, Eugenio told Officer Cobb the man who slapped him had also robbed him two weeks earlier, and before they reached the 7-Eleven, Eugenio spotted defendant in an alley. Eugenio pointed defendant out to Officer Cobb, and the officer stopped and detained defendant.[4]

Another police car arrived after Officer Cobb apprehended defendant, and Officer Cobb moved Eugenio from his patrol car to the second car. When defendant saw Eugenio, defendant became angry and started yelling; he exclaimed, "that little fucker was stealing my recyclables" and added "that's the second time that he has done that." Eugenio was about ten feet away from defendant at the time, and Eugenio told Officer Cobb defendant appeared to be wearing the watch he previously took from Eugenio.

According to Officer Cobb, he took the watch from defendant and, covering the watch so Eugenio could not see it,

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[4] Although Eugenio described the man who robbed him as having short "poofy" hair a couple weeks earlier, defendant was bald when Eugenio pointed him out to Officer Cobb.

asked Eugenio to describe it. Eugenio said his watch was a black rubberized S-Shock brand watch with a scratch on the left side of the face and blue paint on the bezel.[5] Officer Cobb observed a scratch on the left side of the watch face and paint on one of the bezels. He returned the watch to Eugenio and informed defendant he was under arrest for robbery.[6] Police detectives later interviewed defendant at the police station, but the recording of the interview was muffled and largely inaudible.

The Los Angeles County District Attorney charged defendant in a single-count information with second degree robbery in violation of Penal Code section 211.[7] The information additionally alleged defendant personally used a deadly and dangerous weapon (a knife) in the commission of the offense and had previously sustained two or more serious and/or violent felony convictions.

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[5] At trial, Eugenio testified he knew it was his watch because he had used a blue pen to mark two spots on the watch, and a black pen to mark two other spots on the watch.

[6] Officer Cobb was not able to identify the scratch on a photo of the watch admitted as an exhibit at trial, but he explained his inability was due to the "graininess" of the photo and the fact that the scratch on the glass face of the watch was only visible if held at an angle.

[7] Undesignated statutory references that follow are to the Penal Code.

C. Relevant Trial Proceedings

1. Overview

The prosecution called three witnesses during its case in chief: Eugenio, Officer Cobb, and Officer Leon (the officer who responded after Eugenio reported the robbery of his watch and other items on July 9, 2016). Defendant testified on his own behalf during the defense case.

As described in greater detail *post*, the trial court sustained hearsay objections to portions of defendant's testimony in which he recounted a purported statement made by a non-testifying officer when Eugenio was asked to identify his watch. The trial court also sustained objections to portions of defendant's testimony regarding his post-arrest interview with detectives at the police station.

In rebuttal, the prosecution called Long Beach Police Department Detective Benjamin Vargas to testify; he participated in defendant's post-arrest interview and he recounted, on direct examination, certain of defendant's interview statements that were offered to impeach defendant's trial testimony. During cross-examination, defense counsel attempted to ask Detective Vargas about other statements defendant may have made during the interview. As described in greater detail *post*, the trial court sustained hearsay objections to some of those questions.

2. Admissibility of defendant's prior felony convictions

Before defendant testified in his own defense, the trial court held an Evidence Code section 402 hearing to determine whether it would permit the prosecution to impeach defendant

with prior felony convictions he had sustained. The prosecution argued it should be allowed to introduce three: a 1998 conviction for assault with a firearm (§ 245, subd. (a)(2)), a 2004 conviction for the same crime, and a 2004 conviction for possession or purchase of cocaine for sale (Health and Saf. Code, § 11351.5).[8]

Defense counsel objected to the admission of the prior convictions, arguing they should be excluded because they were too old to be probative of credibility. Defense counsel further argued that if the assault convictions were admitted, they should be "sanitize[d]" such that the jury would understand neither conviction was related to "some kind of theft." The prosecution contended it should be able to impeach defendant with all of the convictions, notwithstanding their remoteness, because defendant in the intervening years had violated parole and committed other offenses—such that he had failed to stay out of custody for any significant period of time.

The trial court ruled the prosecution could use all three convictions to impeach defendant. The court, however, agreed with the defense that the jury should be told the assault convictions were not theft-related.

When defendant testified, it was his attorney who brought out the fact of defendant's convictions on direct examination.

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[8] The prosecution also sought to introduce two prior felony convictions for violation of Health and Safety Code section 11352. The trial court denied the request as to those convictions because there was some uncertainty regarding whether the prosecution had met its burden of proof to demonstrate the convictions constituted crimes of moral turpitude for impeachment purposes.

Defendant admitted he sustained each of the felonies, including the two assaults that were "not theft related."

3. Jury instructions

When discussing jury instructions, defense counsel asked the trial court to add language to CALCRIM No. 315, the pattern jury instruction on eyewitness identification. Specifically, defense counsel asked that the court insert language, in the list of circumstances a jury should consider when evaluating eyewitness testimony, "that [Eugenio] had corrective lenses or something of that nature, the lack of glasses that were testified to." The trial court declined because "[t]here was no inquiry, period, to [Eugenio] as to why was he wearing glasses today and not then; [i.e.,] are the glasse[s] for reading or distance." The court stated the parties would be permitted to argue the point to the jury, but without a pinpoint instruction.

D. Verdict and Sentencing

The jury found defendant guilty of second degree robbery but found the allegation that he used a deadly weapon in the commission of the crime not true.

Prior to sentencing, defendant's attorney filed a *Romero* motion asking the trial court to dismiss at least one of defendant's prior "strike" convictions. The motion argued dismissal was warranted because defendant would still receive a lengthy sentence, because his prior strike convictions were remote in time, because he grew up in a chaotic home environment that involved physical and emotional abuse, and because he received only a negotiated sentence of one year on probation for his 2004 strike conviction for assault with a

firearm. A psychiatric report detailing defendant's personal and psychiatric history was submitted as an exhibit to the *Romero* motion.

At sentencing, the trial court stated for the record it reviewed defendant's motion and the prosecution's opposition; defense counsel also noted the court had stated off the record it had reviewed the defense-submitted psychiatric report. The trial court further noted it was "fully aware of all of its discretionary powers" and had "consider[ed] both sides."

The trial court denied the *Romero* motion, finding defendant had spent about 80 percent of his life in prison, his crimes were escalating, and it "just [did not] understand why [defendant] would pick on this kid [i.e., Eugenio] for this . . . . unless, respectfully speaking, [defendant] has a criminal mind that he can take over a situation and not absolve himself from it." In making its ruling, the trial court discussed aggravating and mitigating factors and noted, as to mitigating factors, it did not "see any that [were] applicable to . . . defendant . . . ."

Having denied the *Romero* motion, the trial court imposed a Three Strikes law 35-years-to-life prison sentence, ten years of which was imposed as a result of the section 667, subdivision (a)(1) impact of defendant's 1998 and 2004 assault with a firearm convictions.

II. DISCUSSION

Defendant's various arguments for reversal are unavailing. The trial court's hearsay rulings were not an abuse of its discretion because defendant cannot rely on the prior inconsistent statement hearsay exception when the out-of-court declarant did

not testify at trial. Nor did the trial court abuse its discretion in adhering to the customary order of proof at a criminal trial and preventing the defense from eliciting, on ostensible rule of completeness grounds, testimony from an interviewing detective about defendant's own post-arrest statements. The trial court was likewise within its discretion to admit evidence of defendant's prior felony convictions for impeachment; though old, they were part of a consistent pattern of criminal activity that left defendant incarcerated or on parole for the majority of his life following the oldest of the convictions admitted. The trial court properly declined to give the pinpoint jury instruction requested by defendant because it was not supported by substantial evidence—there was no testimony about why Eugenio wore glasses and whether the absence of glasses would have affected his ability to see the person who robbed him. Finally, as to the sentencing claims, the record demonstrates the trial court stayed within the bounds of its discretion in denying defendant's *Romero* motion and defendant has not carried his burden to show the resulting sentence constitutes cruel or unusual punishment.

A. The Trial Court Did Not Err in Striking as Hearsay Defendant's Testimony Concerning Eugenio's Identification of the Watch

Defendant asserts the trial court wrongly struck certain portions of his testimony that related his account of what happened when the responding police officers asked Eugenio if he could identify the watch defendant was wearing when apprehended. Although at bottom a challenge to the trial court's determination the testimony was hearsay, defendant frames the argument in constitutional terms, asserting the court's ruling

"violated appellant's fundamental rights to testify, present a defense, and challenge the prosecution's case." We reject the constitutional framing and conclude the trial court's evidentiary rulings were not an abuse of discretion.[9] (*Taylor v. Illinois* (1988) 484 U.S. 400, 410 ["[t]he accused does not have an unfettered right to offer testimony that is . . . otherwise inadmissible under standard rules of evidence"]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *People v. Mickel* (2016) 2 Cal.5th 181, 218-219; *People v. Jones* (2013) 57 Cal.4th 899, 957 ["[T]he routine application of provisions of the state Evidence Code law does not implicate a criminal defendant's constitutional rights. [Citation.] Instead, because the trial court merely excluded some evidence . . . and did not preclude defendant from presenting a defense, any error would be one of state evidentiary law only"]; see also *People v. Waidla* (2000) 22 Cal.4th 690, 725 [abuse of discretion standard of review applies].)

1. Additional background

During defendant's testimony on re-direct, his attorney asked him to describe what happened after the police detained him and removed the watch he was wearing. Defendant responded in narrative fashion: "I think one of the younger cops, not the one testifying, asked him—told the other cop like how do you know it is his watch. He said because he said there are scratches all over the face. The older cop [not Officer Cobb] looked at it. And the three cops went to the side *and said there are no scratches on this watch*. And then he took it to him and

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[9] Relatedly, we disregard any theories of admissibility raised only in reply. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1218.)

said, hey, man—" (Emphasis ours.) At this point, the prosecution objected and the court sustained the objection and struck the entire answer. Defense counsel did not protest the ruling; indeed, she admonished her client, "you cannot say what other people said, just [say] what you observed happen."

Defense counsel proceeded to ask defendant a series of targeted questions regarding the watch, and defendant answered the watch he was wearing had no scratches on its face, had no "black marks" anywhere on it, but did have "a little blue mark that they showed me after the fact," which appeared to defendant as if there had been "like some paint scraped on it." Defense counsel then again asked defendant to describe what the "older cop" did once he took the watch off defendant's arm. Defendant responded, "He walked it up in the back of the patrol car and put it in the guy's face *and said this watch don't have no scratches on it*." (Emphasis ours.) The court sustained its own objection to this answer and called the attorneys to sidebar. The court admonished defense counsel to prevent defendant from volunteering inadmissible hearsay, adding "[h]e knows what he is doing" and "[h]e is doing it on purpose."

Defense counsel resumed questioning defendant and asked what the police officers had done with the watch, this time cautioning defendant he should not relate anything that anyone else told him or that he overheard. Defendant testified one of the officers took the watch, showed it to Eugenio and said something to him, brought the watch back to defendant, and then ultimately took the watch away from defendant.

2. Analysis

Defendant contends the trial court erroneously ruled his testimony relating the purported statement that the watch had no scratches was hearsay. In his view, the testimony falls within the hearsay exception for inconsistent statements because the testimony impeached Eugenio's description of how he identified the watch and Officer Cobb's testimony that he did not show the watch to Eugenio before asking him to identify it. (Evid. Code, § 1235 ["Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with [Evidence Code] Section 770"]; see also Evid. Code, § 770 [out-of-court inconsistent statements by a witness "shall be excluded" unless the witness is given an opportunity to explain or deny the statement when testifying].) Defendant's argument is forfeited on appeal, and regardless, the trial court's hearsay ruling was not an abuse of discretion.

Evidence Code section 354, subdivision (a) states: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence . . . it appears of record that: [¶] (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means[.]" Where testimony is excluded on hearsay grounds, the proponent of the evidence must show the testimony falls within an exception to the rule. (*People v. Livaditis* (1992) 2 Cal.4th 759, 778.) During trial, defense counsel made no attempt to demonstrate the purpose or relevance of defendant's objected-to answers, nor did counsel invoke the inconsistent statements hearsay exception defendant

now relies on to assert error. The issue is therefore forfeited. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1178.)

Even putting the forfeiture aside, the argument is meritless. Defendant never precisely identifies the statements by either Eugenio or Officer Cobb that were supposedly inconsistent with his own testimony on this point, and for good reason. The hearsay statements defendant attempted to relate when testifying (both of which were to the effect of "this watch don't have no scratches on it") were, by defendant's own admission, made by another officer (or officers) at the scene who did not testify at trial. The necessary predicate for invoking the inconsistent statements hearsay exception—that the declarant who made the out-of-court statement first be given an opportunity to affirm or deny making the statement (Evid. Code, § 770)—therefore went unsatisfied.

B. The Trial Court Did Not Err in Adhering to the Customary Order of Proof and in Ruling on the Admissibility of Defendant's Post-Arrest Interview Statements

1. Additional background

During defendant's direct examination, he stated he bought the watch in question months before his arrest for $15 at a "99 cent store, which is not a real 99 cent store." He also testified, among other things, that he spoke to detectives at the police station after his arrest, told them the truth, and had been telling the "same story since day one." Up to this point during trial, the prosecution had not yet introduced evidence concerning defendant's post-arrest statements.

On cross-examination, the prosecution asked a series of follow-up questions about where defendant claimed to have purchased the watch and how much it cost, as well as certain questions about what defendant told the police in his post-arrest interview. As to the post-arrest interview, the prosecution specifically asked, for purposes of framing later impeachment, whether defendant told the police detectives (1) he threatened to harm Eugenio if he ever stole defendant's recyclables again, (2) he confronted Eugenio outside the doughnut shop and warned him to stay away from the recyclables, and (3) Eugenio would lie about being robbed and assaulted because defendant threatened to beat Eugenio up if he stole recyclables again.[10]

When the time came for defense counsel's redirect examination, she asked defendant what he told detectives about where he obtained the watch in question. Defendant responded: "I don't remember if they asked me where I got the watch. I don't remember if they asked me 'cause I told them what the hell would I steal a cheap ass phone for." The prosecution objected to the answer and the court sustained the objection and ordered the answer stricken. Defense counsel then attempted to ask several additional questions concerning defendant's post-arrest statements: (1) "Did you talk to them [the detectives] about how Mr. Eugenio had stolen recycling on more than one occasion?"; (2) "Did any of [the detectives] ask you for any further information

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[10] Defendant's answer to the first of these questions was "no," his answer to the second was a qualified "no" (defendant admitted he slapped Eugenio and warned him to "stay out of my people yards"), and his answer to the third was an unequivocal "no."

about details about when or where this theft took place?"; (3) "Did you give the officers details about where and when this—" The trial court sustained hearsay objections to each of these questions and ordered any answers given by defendant stricken.

Later, outside the presence of the jury, defense counsel briefly argued the hearsay objections should have been overruled. She explained her understanding was that the prosecution would be calling one of the interviewing detectives to impeach defendant's trial testimony, and she stated she wanted to have her client testify as to what he said during the post-arrest interview because the prosecution's cross-examination questions were "not direct quotes from an audio recording of this interview." Defense counsel maintained she had "the right to attempt to rehabilitate if [defendant's] going to be impeached . . . . [and] that's what I was attempting to do." The trial court stated it would not change its ruling but made clear the defense would be permitted to recall defendant to testify, if it so chose, after the prosecution presented its rebuttal case.

The prosecution called Detective Vargas as a rebuttal witness, and he testified to his recollection of statements defendant made during his post-arrest interview. According to Detective Vargas, defendant admitted he told Eugenio outside the doughnut shop that if he ever attempted to steal his recyclables again, he (defendant) would beat Eugenio up; defendant denied he ever hit Eugenio; and as to the watch, defendant said he purchased it for $5 and it had blue coloring on one of the bezels because it was paint that rubbed off from a bicycle he owned. Detective Vargas also testified defendant became "a little evasive, a little upset" when asked further

questions about the bicycle and from whom he purchased the watch.

On cross-examination, defense counsel asked Detective Vargas whether defendant said "why would I start robbing people at 40 years old" during the post-arrest interview. The prosecution objected on hearsay grounds and the trial court sustained the objection. Defense counsel then argued the objection at sidebar, contending "whenever there is a statement made to the police, I can ask questions about everything he said. The hearsay statements that were allowed in on the side of the prosecution—I'm allowed under the rule of completeness everything said to the officers now can come in." The trial court adhered to its ruling, explaining the statement the defense sought to elicit was hearsay and not subject to the rule of completeness because "the People didn't get into that area."

2. Analysis

Defendant seeks reversal based on the trial court's evidentiary rulings during his own testimony and Detective Vargas's testimony. As to the former, he believes the trial court should have exercised its discretion to depart from the customary order of proof at trial so as to permit him to testify to the out-of-court statements he made during his post-arrest interview because the "prosecution should have introduced evidence of the interrogation as part of [its own] case-in-chief." As to the latter, defendant reprises the rule of completeness argument he made in

the trial court.[11] Defendant's arguments on both points are unpersuasive.

a. the order of proof

The statutorily prescribed order of proof in a criminal trial is well-known: the prosecution presents its case first, the defense presents any evidence it wishes to present next, and both sides may then "respectively offer rebutting testimony only." (§ 1093, subds. (c)-(d).) Trial courts have discretion to vary from this order of proof, and we will not reverse a judgment unless a court's decision to adhere to or depart from the customary order of proof constitutes a "palpable abuse" of that discretion. (*People v. Demond* (1976) 59 Cal.App.3d 574, 587; see also *People v. Case* (2018) 5 Cal.5th 1, 46 ["'The order of proof rests largely in the sound discretion of the trial court, and the fact that the evidence in question might have tended to support the prosecution's case-in-chief does not make it improper rebuttal. [Citations.] It is improper for the prosecution to deliberately withhold evidence that is appropriately part of its case-in-chief, in order to offer it after the defense rests its case and thus perhaps surprise the defense or unduly magnify the importance of the evidence. Nevertheless, when the evidence in question meets the requirements for impeachment it may be admitted on rebuttal to meet the evidence on a point the defense has put into dispute'"].)

The trial court did not abuse its discretion by opting not to vary from the statutorily prescribed order of proof to, as

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[11] Defendant does not argue the "why would I start robbing people at 40 years old" remark would qualify as a prior consistent statement.

defendant now suggests, provisionally admit his hearsay testimony concerning his own statements during the post-arrest interview subject to a later motion to strike. Although defendant complains the prosecution did not admit evidence of the post-arrest interview during its own case-in-chief, the record indicates that was by agreement of the prosecution and defense to avoid an issue as to whether the statement would be admissible under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) if offered by the prosecution as affirmative evidence of guilt (rather than impeachment evidence).[12] (See generally *Harris v. New York* (1971) 401 U.S. 222, 225-226.) Defendant cannot now protest the sequence in admitting evidence that he stipulated to below. (See *People v. Race* (2017) 18 Cal.App.5th 211, 219, fn. 4.) Moreover, even if defendant had not agreed to the order of proof of which he now complains, the trial court still did not abuse its discretion by adhering to customary procedure. (*People v. Mayfield* (1997) 14 Cal.4th 668, 762 [no abuse of discretion where court allowed prosecution to use the defendant's out-of-court "statement in rebuttal, even though it was known to the prosecution before trial and could have been used during the prosecution's case-in-

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[12] During trial, the court and the parties discussed whether it would be necessary to hold evidence admissibility hearings (Evid. Code, § 402) concerning certain matters. Addressing counsel, the trial court stated "there were two 402's . . . . one was about the defendant's prior convictions, and the other was about the possibility of the defendant's prior out of court statements." Defense counsel responded, "The 402 regarding the statements. [¶] We will not have to have a *Miranda* hearing after discussion." The court clarified, asking, "That is resolved between the two of you?" Defense counsel responded "[y]es."

chief"].) The questions asked of defendant during the defense case called for hearsay at that juncture and the court rightly precluded them while making clear defendant would be permitted to retake the witness stand in a defense rebuttal case if he so desired. That is how it should be done.

b. the rule of completeness

Evidence Code section 356, which codifies the "rule of completeness," provides in relevant part that "[w]here part of [a] . . . conversation . . . is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; . . . when a . . . conversation . . . is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

"The purpose of Evidence Code section 356 is to avoid creating a misleading impression. [Citation.] It applies only to statements that have some bearing upon, or connection with, the portion of the conversation originally introduced. [Citation.] Statements pertaining to other matters may be excluded." (*People v. Samuels* (2005) 36 Cal.4th 96, 130; see *People v. Zapien* (1993) 4 Cal.4th 929, 959.) Although "the courts do not draw narrow lines around the exact subject of inquiry" (*People v. Harris* (2005) 37 Cal.4th 310, 334), courts will not find error in excluding evidence proffered under the rule of completeness if the evidence introduced leaves no misleading impression (*People v. Pearson* (2013) 56 Cal.4th 393, 460-461 (*Pearson*)). We review a trial court's determination of whether or not to admit evidence under Evidence Code section 356 for abuse of discretion. (See *People v. Pride* (1992) 3 Cal.4th 195, 235.)

There was no abuse of discretion here. Defendant complains he was unable to ask Detective Vargas whether he said, during his post-arrest interview, "why would I start robbing people at 40 years old?" The prosecution's questions to Detective Vargas on direct examination (and its cross-examination questions posed to defendant himself) concerned defendant's statements regarding his history of interactions with Eugenio, whether he hit or threatened Eugenio, where defendant purchased the watch, and how the blue paint may have come to be on the watch. That testimony did not address the same subject as defendant's reported rhetorical question—which appeared to address defendant's motive (or lack thereof) for the crime and sought to improperly relate a self-serving assertion he had never robbed anyone—and there is no support in the case law for the position defendant advanced in the trial court, namely, that "[w]henever there is a statement made to the police, [the defense] can ask questions about everything he said." (*People v. Perry* (1972) 7 Cal.3d 756, 787 ["'The rule [of completeness] is not applied mechanically to permit the whole of a transaction to come in without regard to its competency or relevancy'"], overruled on other grounds in *People v. Green* (1980) 27 Cal.3d 1.)

Furthermore, the utterance defendant contends the trial court wrongly excluded was entirely unnecessary to avoid leaving the jury with a misleading impression of defendant's position during his post-arrest interview. (See *Pearson*, *supra*, 56 Cal.4th at pp. 460-461 [defendant's recorded statements expressing remorse for murder not admissible under Evidence Code section 356 because the excerpt introduced by the prosecution without the expressions of remorse was not misleading].) It would have

been quite clear to the jury—from testimony received without objection—that defendant generally denied robbing Eugenio during his post-arrest interview with police detectives. Admitting defendant's "why would I start robbing people at 40 years old" statement would have added nothing; indeed, the rhetorical form of the statement means it has little assertive content at all. Admitting the statement was accordingly unnecessary to give the jury a fair picture of the post-arrest interview and it would not have impacted the jury's deliberations on defendant's guilt. (*People v. Arias* (1996) 13 Cal.4th 92, 156-157.)

C. The Trial Court Did Not Abuse Its Discretion by Admitting Evidence of Defendant's Prior Convictions

Subject to the trial court's discretion under Evidence Code section 352, a witness's prior felony convictions for crimes of moral turpitude are admissible to impeach the witness. (Evid. Code, § 788; *People v. Green* (1995) 34 Cal.App.4th 165, 182 (*Green*).) "When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness's honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant's decision to testify. (*People v. Beagle* (1972) 6 Cal.3d 441, 453[(*Beagle*)]; [ ]*Green*[, *supra*,] 34 Cal.App.4th[at p.] 183[ ].)" (*People v. Clark* (2011) 52 Cal.4th 856, 931.) We review a trial court's decision to admit prior felony convictions for impeachment purposes for abuse of discretion. (*Green*, *supra*, at pp. 182-183.)

Defendant argues the three felony convictions the trial court permitted the prosecution to use for impeachment purposes (the 1998 and 2004 convictions for assault with a firearm and the 2004 conviction for possession or purchase of cocaine for sale) should have been excluded—chiefly because of their age relative to the 2017 trial. In our view, the trial court was within its discretion to permit impeachment with all of the prior convictions.

It is well established that "convictions remote in time are not automatically inadmissible for impeachment purposes. Even a fairly remote prior conviction is admissible if the defendant has not led a legally blameless life since the time of the remote prior." (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925-926.) That is the circumstance here: Defendant has engaged in behavior that has repeatedly landed him back in custody since his 1998 conviction. He violated the terms of his parole in 2001 and 2002, and he was arrested in 2003 for the crimes that led to his 2004 convictions and resulted in a ten-year prison sentence. In addition, though the trial court did not admit it for impeachment purposes, defendant also suffered another felony conviction in 2014 for a drug offense. Defendant thus spent all of the time following his 1998 conviction in and out of custody, and given these circumstances, the convictions were not so remote as to require exclusion of the prior convictions.[13] (See, e.g., *People v.*

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[13] None of the other factors identified in *Beagle* suggest the trial court abused its discretion. Defendant's prior convictions for assault with a deadly weapon and possession of a controlled substance for sale are both considered crimes of moral turpitude for impeachment purposes. (*People v. Thomas* (1988) 206 Cal.App.3d 689, 700 [assault with deadly weapon]; *People v.*

Carpenter (1999) 21 Cal.4th 1016, 1055-1056 [17-year old prior felony convictions admissible where the defendant had been "incarcerated most of the intervening time"].)

Defendant additionally argues the trial court erred by ruling on the admissibility of the convictions "[w]ithout [r]eference to Evidence Code, [s]ection 352." The governing rule is that "'a court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing functions under Evidence Code section 352.' [Citation.]" (*People v. Doolin* (2009) 45 Cal.4th 390, 438.)

Defendant is correct in observing the trial court never expressly referenced Evidence Code section 352, but the record adequately reveals the court was aware of and performed the requisite balancing. The trial court noted for the record it was aware of the *Beagle* factors and stated it "fully underst[ood] and agree[d] that one of the stronger elements of denying the People's

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Castro (1985) 38 Cal.3d 301, 317 [possession for sale].) Assault and possession for sale are not substantially similar to robbery, especially since defendant's assault convictions were "sanitized" to clarify they did not involve theft. And defendant's prior convictions—which he knew in advance would be admitted at trial—did not dissuade him from testifying.

Relatedly, we reject defendant's argument that the trial court failed to "fully sanitize" the prior convictions it permitted the prosecution to use. The defense asked only that the court require the jury to be told the assault convictions were not theft-related, the trial court agreed, and defendant's trial counsel made clear the prior convictions were not theft related when eliciting her client's admission to having sustained the convictions. No more was required.

request to use prior convictions of moral turpitude for impeachment is . . . the remoteness of it, the age of the defendant at the time of the incident . . . [and] conviction." The trial court noted remoteness "is combined with other factors as to whether or not there are future convictions that are of the same type or more aggravated than the initial conviction vis-à-vis the remoteness and/or whether or not the person has conducted a life free of crime or of some other crime and sometimes in particular the type of crime that it was in the future." The court explained it had a problem with defense counsel's request to exclude the convictions because defendant had committed several felonious crimes of moral turpitude and continued engaging in criminal activity after his older convictions. The court also indicated it had determined the prior convictions were "not connected" to the current offense and there was not, in this situation, a nexus between the prior assaults and the robbery charge.

The record the court made is the functionally adequate equivalent of the requisite Evidence Code section 352 analysis (as to undue prejudice, the only Evidence Code section 352 consideration defendant invokes). (*People v. Mendoza*, *supra*, 78 Cal.App.4th at p. 925 ["'Sections 788 and 352 of the Evidence Code control the admission of felony convictions for impeachment. Together, they provide discretion to the trial judge to exclude evidence of prior felony convictions when their probative value on credibility is outweighed by the risk of undue prejudice. [Citation.]" (*People v. Muldrow* (1988) 202 Cal.App.3d 636, 644[ ].) In exercising its discretion, the trial court must consider four factors identified by our Supreme Court in . . . *Beagle* . . ."].) Reversal is unwarranted.

D. The Trial Court Properly Denied Defendant's Request for an Eyewitness Testimony Pinpoint Instruction

"A defendant is entitled to a pinpoint instruction, upon request, only when appropriate. [Citation.] 'Such instructions relate particular facts to a legal issue in the case or "pinpoint" the crux of a defendant's case, such as mistaken identification or alibi. [Citation.] They are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte.' [Citations.]" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 824.) For a pinpoint instruction to be appropriate, it must be accurate, non-argumentative, non-duplicative, and supported by substantial evidence. (*People v. Bolden* (2002) 29 Cal.4th 515, 558.) We independently review whether a pinpoint instruction should have been given. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

CALCRIM No. 105, the general instruction regarding witness testimony, instructed jurors that "[a]mong the factors" they could consider in judging the credibility and believability of a witness was, "How well could the witness see, hear, or otherwise perceive things about which the witness testified?" The jury instruction defendant wanted the court to modify for pinpoint purposes, CALCRIM No. 315, further advised the jury that in evaluating "eyewitness testimony identifying the defendant" the jury was to consider certain questions including, "How well could the witness see the perpetrator?" and "What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance, and duration of observation?" As he did in the trial court, defendant argues language should have been added to the CALCRIM No.

315 instruction to make reference to Eugenio's "lack of glasses" at the time of the charged robbery.

Because the requested pinpoint instruction was not supported by substantial evidence, the trial court did not err in refusing to give it. As the trial court correctly emphasized, there was no testimony at trial that shed any light on why Eugenio wore glasses some days but not others, whether the glasses were prescription or cosmetic, and if prescription, whether Eugenio wore them to compensate for some unknown degree of difficulty in seeing things far away or nearby. In light of Eugenio's testimony that defendant was two to twelve inches away during the robbery, the absence of further inquiry about his glasses means there was no reason to pinpoint the glasses issue for the jury in an instruction. At best, adding the language the defense requested to the pattern instruction would have been argumentative; at worst, it would have been misleading or invited speculation.

E. There Was No Cumulative Error at Trial

Defendant contends the cumulative effect of the various purported errors of which he complains deprived him of due process and a fair trial. Having failed to establish multiple errors, defendant's cumulative error claim is meritless. (See, e.g., *People v. Sattiewhite* (2014) 59 Cal.4th 446, 491; *People v. Edwards* (2013) 57 Cal.4th 658, 767.)

F. The Court Did Not Abuse Its Discretion by Denying Defendant's Romero Motion

Under section 1385, subdivision (a), and in furtherance of justice, a trial court may strike or dismiss an allegation under the

Three Strikes law that a defendant has previously been convicted of a serious or violent felony. (*Romero*, *supra*, 13 Cal.4th at pp. 529-530.) In doing so, "the 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 [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.' [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).) A court must state its reasons for *dismissing* a strike conviction (§ 1385, subd. (a)), but a court is not required to "'explain its decision *not* to exercise its power to dismiss . . . .' [Citation.]" (*Carmony*, *supra*, at p. 376, italics added.)

We review a trial court's decision to refrain from dismissing a prior felony conviction allegation under section 1385 for abuse of discretion. (*Carmony*, *supra*, 33 Cal.4th at p. 375.) Defendant bears the burden of establishing the trial court's decision was irrational or arbitrary; that reasonable minds might differ is not enough. (*Id*. at pp. 375-376, 378.) Absent such a showing, we presume the trial court acted to achieve lawful sentencing objectives. (*Id*. at pp. 376-377.) "'[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 . . . .' [Citation.]" (*Id*. at p. 378.)

As already summarized, defendant has a substantial criminal history that spans nearly 20 years, from 1996 to 2016. Defendant committed his first offense (burglary) at 19 years old,

and he committed his first felony offense (assault with a firearm, which led to the 1998 conviction) a year later. After his release on parole from this first felony conviction, defendant twice violated the terms of his parole and sustained additional felony assault and drug-related convictions that ultimately resulted in a 10-year prison sentence. And he committed the robbery offense of conviction here within a year of being released from a five-year prison sentence for a subsequent 2014 conviction for transport or sale of a controlled substance. The longest period of time defendant has been free from custody since 1998 is one year and three months.

The offense of conviction, though not especially serious in light of the property taken, does bear hallmarks of aggravation because it is, at bottom, an attack on a vulnerable victim. In light of the evidence in the record regarding Eugenio's apparent learning disability and the trivial nature of what provoked defendant's robbery of (and assault on) Eugenio, we agree with the trial court that it is hard to "understand why [defendant] would pick on this kid for this." Defendant's attitude toward the attack on Eugenio (as revealed during his trial testimony), in combination with his prior history, also leaves us convinced his prospects for the future are unfortunately poor.

Defendant's response to all this, i.e., that the trial court improperly ignored mitigating factors detailed in his psychiatric evaluation, rings hollow. The record is clear that the court reviewed all the papers submitted in connection with the motion, including the psychiatric report. Although the trial court was not required to provide an explanation of its reasons for denying the *Romero* motion at all (*Carmony*, *supra*, 33 Cal.4th at p. 376), "the fact that the court focused its explanatory comments on

[defendant's criminal history] does not mean that it considered only that factor" (*People v. Myers* (1999) 69 Cal.App.4th 305, 310 (*Myers*)).

The trial court's decision to deny defendant's *Romero* motion was not an abuse of discretion. (*Carmony*, *supra*, 33 Cal.4th at pp. 378-379; *Myers*, *supra*, 69 Cal.App.4th at pp. 309-310.)

G. Defendant's Sentence Did Not Constitute Cruel or Unusual Punishment

Defendant contends his sentence of 35 years to life amounts to cruel and/or unusual punishment under both the Unites States and California Constitutions. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.)

1. Forfeiture

The issue of whether a sentence is cruel and unusual punishment is a fact intensive inquiry under state and federal law that is based on the nature and facts of the crime and offender and is forfeited if not raised in the trial court. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583 (*Kelley*); *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196; see also *Solem v. Helm* (1983) 463 U.S. 277, 287 [question of disproportionate punishment cannot be considered in the abstract] (*Solem*).) Although defendant filed a *Romero* motion urging the trial court to exercise its discretion to dismiss his prior strikes, he never claimed a Three Strikes sentence would violate the constitutional prohibitions against cruel or unusual punishment. Defendant has thus forfeited the issue. (*Kelley*, *supra*, at p. 583.) Even if defendant's claims were

not forfeited, however, they would not succeed on the record before us.

2. Federal Constitution

Under the Eighth Amendment to the United States Constitution (applicable to the states via the Fourteenth Amendment), a "'narrow proportionality principle . . . applies to noncapital sentences.'" (*Ewing v. California* (2003) 538 U.S. 11, 20 (plur. opn. of O'Connor, J.) (*Ewing*), quoting *Harmelin v. Michigan* (1991) 501 U.S. 957, 996-997 (*Harmelin*).) This constitutional principle "'forbids only extreme sentences that are "grossly disproportionate" to the crime.'" (*Id.* at p. 23, quoting *Harmelin*, *supra*, at p. 1001.) Objective factors guiding the proportionality analysis include "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." (*Solem*, *supra*, 463 U.S. at p. 292.) Only in the rare case where the first factor is satisfied does a reviewing court consider the other two factors. (*People v. Baker* (2018) 20 Cal.App.5th 711, 733; *People v. Reyes* (2016) 246 Cal.App.4th 62, 82-83.) Recidivism has traditionally been recognized as a proper ground for increased punishment. (*Ewing, supra*, at p. 25 (plur. opn. of O'Connor, J.).)

Here, as already described, appellant's current crimes and his pattern of criminal (often violent) behavior supported his lengthy sentence. Defendant, however, argues the gravity of his offense is not commensurate with the severity of the penalty, and he points to his psychiatric report that recommends he receive treatment; he also emphasizes the offense of conviction (as distinguished from his prior assaults) did not involve a weapon,

serious injury, the taking of property with significant value, or the loss of that property. Even taking these points into account, we cannot say defendant's sentence is grossly disproportionate or shocking in light of the facts of his current offense and, more importantly, his recidivism. (See, e.g., *Lockyer v. Andrade* (2003) 538 U.S. 63, 66-68, 77 [trial court validly imposed Three Strikes sentence of 50 years to life for two felony "wobbler" petty theft convictions with a prior and three prior residential burglaries]; *Ewing*, *supra*, 538 U.S. at pp. 19, 30-31 (plur. opn. of O'Connor, J.) [Three Strikes sentence of 25 years to life upheld for grand theft of three golf clubs worth $1,200 with three prior burglary and one prior robbery conviction]; see also *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511-1512 [citing *Rummell v. Estelle* (1980) 445 U.S. 263, 265-266] (*Martinez*).)

3. California Constitution

Article I, section 17 of the California Constitution proscribes "cruel or unusual punishment." Although this language is construed separately from the federal constitutional ban on "cruel and unusual punishment" (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085), the method of analysis is similar: the reviewing court considers "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society"; a comparison of "the challenged penalty with the punishments prescribed in the *same jurisdiction* for *different offenses*"; and a comparison of "the challenged penalty with the punishments prescribed for the *same offense* in *other jurisdictions* . . . ." (*In re Lynch* (1972) 8 Cal.3d 410, 425-427.) The purpose of this analysis is to determine whether the punishment is "so disproportionate to the crime for which it is

inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*Id.* at p. 424.)

For the reasons already summarized, this is not the rare case where the sentence is so disproportionately harsh as to shock the conscience or to offend fundamental notions of human dignity. (See *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1631.) Defendant's "comparison of [his] 'punishment for his current crimes with the punishment for other crimes in California is inapposite since it is his recidivism in combination with his current crime[ ] that places him under the three strikes law.'" (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 571 (*Sullivan*).) And defendant's argument that the recidivist statutes in other jurisdictions demonstrate California's Three Strikes law is constitutionally cruel or unusual is unavailing. (*Sullivan*, *supra*, at pp. 572-573; *Martinez*, *supra*, 71 Cal.App.4th at p. 1516; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1338.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, Acting P.J.

We concur:

MOOR, J.

KIM, J.*

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