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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.

JIMMY J. JACKSON,

Defendant and Appellant.

B278754

(Los Angeles County
Super. Ct. No. SA089482)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie E. Brown, Judge. Affirmed as modified.

Marta I. Stanton, 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, Victoria B. Wilson, Supervising Deputy Attorney General, Kathy S. Pomerantz, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Jimmy James Jackson (defendant) admits he intended to steal from a department store when he rolled a shopping cart full of merchandise out its front door. After a store employee stopped him just outside the door, defendant slapped away the employee's hand and pushed past the employee with his shoulder so he could continue on with the shopping cart and merchandise unimpeded. We are asked to decide whether there was substantial evidence that defendant used force or fear to steal the merchandise—such evidence is required for the taking to constitute robbery—and whether the trial court abused its discretion in denying defendant's *Romero*¹ motion at sentencing.

I. BACKGROUND

A. *The Charges Against Defendant*

The Los Angeles County District Attorney charged defendant with second degree robbery (Pen. Code, § 211),² grand theft of personal property (§ 487, subd. (a)), and exhibiting a deadly weapon (§ 417, subd. (a)(1)). As to the robbery and grand theft counts, the information against defendant additionally alleged he used a deadly weapon in the commission of the offense (specifically, a knife). The information further alleged defendant had been convicted of two prior “strike” felonies as defined in Penal Code section 667, subdivision (d) and section 1170.12.

¹ *People v. Romero* (1996) 13 Cal.4th 497 (*Romero*).

² Undesignated statutory references that follow are to the Penal Code.

B. The Prosecution's Case at Trial

James Campos and Donaven Huff work as loss prevention officers at the Kohl's department store on Sepulveda Boulevard in Westchester. Via closed-circuit television, the officers observed defendant enter the store one evening and place merchandise into a shopping cart without looking at the price. Defendant was in the store approximately 10 minutes and put approximately 18 items into the cart. At that point, an unidentified man entered the store and spoke to defendant. Defendant then grabbed the shopping cart and left the store.

Campos was already stationed outside the store waiting to confront defendant. He identified himself as a Kohl's loss prevention officer and asked to speak to defendant about the unpaid merchandise in the shopping cart. Initially, defendant let go of the shopping cart and Campos believed defendant intended to cooperate and return to the store. But then the same unidentified man defendant spoke to inside the store came outside and told defendant to "[t]ake that shit."

Defendant reached for the shopping cart and Campos said, "You're not taking it anywhere." Campos grabbed two comforters on top of the shopping cart and threw them into the store. When Campos next tried to retrieve the shopping cart, defendant slapped his hand and aggressively said, "Get the fuck away from me. I'm taking this." Defendant then walked past Campos, pushing him out of the way with his (defendant's) shoulder.

At that point, according to Campos, defendant reached into his waistband. Believing defendant intended to pull out a weapon, Campos backed away. Defendant pulled out a six-inch knife and held it up, which scared Campos. Defendant then

walked away with the shopping cart and merchandise, and he was later apprehended by the police.

C. The Defense Case at Trial

Defendant testified in his own defense. He admitted that he entered the store, filled the shopping cart with merchandise, and left the store with the cart—all with the intent to steal the merchandise. But he related the following sequence of events after the items were in his cart.

Upon leaving the store, defendant was confronted by both Campos and Huff. Campos identified himself as a loss prevention officer. Campos also grabbed the two comforters, saying “[t]hose belong to me,” and then went into the store. While Huff was arguing with another man, defendant left and headed down the street.

Defendant testified he never had or displayed a knife at any point during the incident.

D. Verdicts and Sentencing

The jury found defendant guilty on the robbery and grand theft counts charged against him, and acquitted him on the exhibiting a deadly weapon count. The jury found not true the deadly weapon enhancements alleged in connection with the robbery and grand theft counts. The jury further found that defendant had been convicted of two serious felonies under section 667, subdivision (a)(1), and had served five prison terms.

Prior to sentencing, defendant asked the court, pursuant to *Romero*, to strike two of his prior convictions that would otherwise render him eligible for a Three Strikes sentence. The prosecution opposed the motion. Following argument at the

sentencing hearing, the trial court denied the *Romero* motion, and imposed a prison term of 38 years to life, consistent with the Three Strikes law.

II. DISCUSSION

We hold there was substantial evidence at trial to establish the force or fear element of robbery. Campos testified that defendant slapped his hand away from the shopping cart and then used his shoulder to push by Campos as defendant walked away from the store with the merchandise. That is enough.

Defendant also contends the trial court erred when it denied his *Romero* motion to strike his prior strike convictions. His primary argument is that the prior robbery strike convictions occurred so long ago (in the 1980s and 1990s) that they should not have an impact on his current sentence. Considering that point and the others defendant advances on appeal, we nevertheless do not believe the trial court's denial of the motion was an abuse of the court's discretion. Defendant has been incarcerated for much of his life since his first conviction for robbery, and each time he was released on parole or received a probationary sentence, defendant continued to commit crimes. This pattern of recidivism is what the Three Strikes law was intended to address.

A. *Substantial Evidence Supports Defendant's Conviction for Robbery*

1. *Standard of Review*

When considering a challenge to the sufficiency of the evidence to support a conviction, ““we review the entire record in the light most favorable to the judgment to determine whether it

contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citation.] We determine “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” [Citation.] In so doing, a reviewing court “presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” [Citation.]” (*People v. Williams* (2015) 61 Cal.4th 1244, 1281.) When undertaking a substantial evidence inquiry, “the testimony of a single witness that satisfies the standard is sufficient to uphold the finding” even if there is a significant amount of countervailing evidence. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052; see also Evid. Code, § 411 [“Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact”]; *People v. Robertson* (1989) 48 Cal.3d 18, 44.)

2. Analysis

To prove a defendant guilty of robbery, the prosecution must demonstrate the defendant “took personal property in the possession of another from his person or immediate presence, against his will, by means of force or fear, and with the specific intent permanently to deprive the person of such property.” (*People v. Myers* (2014) 227 Cal.App.4th 1219, 1226; see also § 211; *People v. Jackson* (2016) 1 Cal.5th 269, 343.) Defendant contends his robbery conviction must be reversed because there was no substantial evidence that his theft of merchandise was “accomplished by means of force or fear.”

(§ 211.) Specifically, defendant argues the evidence that he slapped Campos's hand when defendant grabbed the shopping cart and then pushed Campos with his shoulder to move past Campos did not rise to the level of force necessary to sustain a conviction of robbery.

Many "cases have discussed the amount of force required for robbery In *People v. Morales* [(1975)] 49 Cal.App.3d 134, 122 Cal.Rptr. 157 [(*Morales*)], the court observed that no case had purported to precisely define that amount of force. 'However, it is established that something more is required than just that quantum of force which is necessary to accomplish the mere seizing of the property.' (*Id.* at p. 139, 122 Cal.Rptr. 157.) . . . An accepted articulation of the rule is that '[a]ll the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance. . . .' [Citations.]" (*People v. Burns* (2009) 172 Cal.App.4th 1251, 1258-1259.) "The force or fear required by section 211 is not synonymous with a physical corporeal assault." (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708.)

The Court of Appeal's decision in *People v. Garcia* (1996) 45 Cal.App.4th 1242 (*Garcia*), disapproved on other grounds in *People v. Mosby* (2004) 33 Cal.4th 353, 365, footnotes 2 and 3, helps illuminate why the evidence of force and fear here is sufficient. In *Garcia*, the defendant (*Garcia*) "entered a market and approached one of the cashiers as she stood in front of an open cash register. [*Garcia*] lightly pushed his left shoulder against the cashier's right shoulder, 'like a tap.' Feeling this push or 'tap' on her shoulder, the cashier moved away from the cash register because she was afraid [*Garcia*] might be armed.

[Garcia] scooped up stacks of bills from the register and escaped.” (*Garcia, supra*, at pp. 1244-1245.)

Garcia argued on appeal that the tap on the cashier’s shoulder was merely an incidental touching and did not satisfy the force requirement for a robbery conviction. (*Garcia, supra*, 45 Cal.App.4th at p. 1246.) The Court of Appeal disagreed, holding “the touching was more than incidental and was not merely the force necessary to seize the money.” (*Ibid.*) The *Garcia* court reasoned: “The defendant did not simply brush against the cashier as he grabbed for the money. He intentionally pushed against her to move her out of the way so he could reach into the register. In terms of *Morales*, pushing the cashier went beyond the ‘quantum of force which [was] necessary’ to grab the money out of the cash register. We agree defendant appears to have been rather polite in his use of force, giving the cashier a mere ‘tap.’ Nevertheless, for purposes of the crime of robbery, the degree of force is immaterial.” (*Ibid.*)

Defendant’s behavior here cannot be described as “rather polite.” Upon first being stopped, defendant let go of the shopping cart and appeared as if he were going to cooperate with Campos. But then the unidentified man appeared and egged on defendant to resume the theft. At that point, defendant slapped Campos’s hand as Campos tried to retrieve the shopping cart. Then, after slapping Campos’s hand, defendant said “something along the lines of, ‘Get the fuck away from me. I’m taking this’” and defendant walked by Campos “so [defendant’s] shoulders pretty much pushed [Campos] out of the way to walk past [him].” Defendant’s actions go beyond the tap on the shoulder considered

sufficient evidence of force in *Garcia* and provide substantial evidence in support of the robbery conviction.³

B. The Trial Court Did Not Abuse Its Discretion in Denying Defendant's Motion to Strike a Prior Serious Felony Conviction

1. Defendant's Romero motion

Defendant asked the trial court to strike two of his prior convictions on the grounds that they “are extremely old”: the first having occurred in 1987 and the second in 1993. The defense emphasized that although both of these convictions were for robbery, neither involved the use of a weapon or resulted in harm to a victim (the jury for the second conviction having found not true the allegation that a knife was used in the robbery, as the jury did in this case).

Defendant further argued relief under *Romero* was warranted because he had not received rehabilitation services while incarcerated or on release. A coordinator from the Veteran's Administration testified at the sentencing hearing that defendant's criminal behavior was mostly attributable to extensive alcohol and drug use that he had never addressed, and that defendant had the opportunity through the Veteran's Administration to participate in a two-year structured rehabilitation program. The defense also noted that the prosecution previously offered defendant a four-year plea deal at

³ In his opening brief, defendant concedes he used “minimal force to take the shopping cart.” While “minimal” is subject to varying interpretations, intentional force beyond that necessary to seize the property is still force sufficient to constitute robbery.

arraignment, which in the defense's view demonstrated the prosecution had been willing to strike the priors before the jury found not true the allegations concerning the use of a knife in the robbery in this case.

The prosecution argued that defendant was a repeat offender and detailed defendant's criminal history at length. Defendant incurred his first "strike" in the 1980s, when he put the victim in a "bare arm hold" and took the victim to the ground while defendant's companion removed money from the victim's pockets. Defendant received a five-year prison sentence. Within two months of being paroled on that case, defendant was convicted of felony drug possession. Defendant then committed a second "strike" robbery, which resulted in an 11-year prison sentence. While in custody, defendant was sentenced to another two years for drug possession. In the year following his release from prison, defendant committed petty theft with a prior, which was deemed a third strike. Defendant received a 25 years to life prison sentence on that conviction, which was later reduced to six years under Proposition 36. Within six months after he was released due to the sentence reduction, defendant committed a misdemeanor weapons violation (involving a knife) and received a three-year probationary sentence. And in the same year after release, while he was on parole and probation, defendant committed this robbery.

After reciting defendant's criminal history, the prosecution contended defendant "is someone who has performed minimally on parole. He has not been able to stay out of custody for more than five or six months at a time. So although the two strike convictions are old, it's because the defendant has spent most of that time since that first strike conviction in custody. [¶] . . . [¶]

This is a third strike robbery. This is what the Three Strikes law was meant to encompass. He is the poster child of what the Three Strikes law was meant to address. . . . They were all serious and very violent felonies. This is just not the case and he is not a candidate for somebody to strike any of the strikes.”

The trial court stated on the record that it had spent a lot of time thinking about defendant’s *Romero* motion and struggled with it. The court ultimately agreed with the prosecution’s position, including its assessment of defendant’s criminal history, and denied the motion. The trial court observed that defendant had victimized people repeatedly, and that defendant had displayed obstinate and disrespectful behavior in the courtroom, which indicated he lacked remorse for his actions and would not be amenable to rehabilitation.

2. *Applicable law and analysis*

“Under section 1385, subdivision (a), a ‘judge . . . may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed.’ ‘In *Romero*, [our Supreme Court] held that a trial court may strike or vacate an allegation or finding under the Three Strikes law that a defendant has previously been convicted of a serious and/or violent felony, on its own motion, “in furtherance of justice” pursuant to . . . section 1385(a).’ [Citation.]” (*People v. Carmony* (2004) 33 Cal.4th 367, 373 (*Carmony*).)

When confronted with the question of whether a prior conviction should be stricken pursuant to *Romero*, a trial court must consider whether the defendant falls outside the “spirit” of the Three Strikes sentencing scheme by looking to the nature and circumstances of the present offense of conviction; the nature and

circumstances of prior serious or violent felony convictions; and the particulars of the defendant's background, characteristics, and prospects. (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).)

We review for abuse of discretion a trial court's decision not to dismiss a prior felony conviction allegation under section 1385. (*Carmony, supra*, 33 Cal.4th at p. 374; *People v. Myers* (1999) 69 Cal.App.4th 305, 310 ["Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance"].)

"If, after having suffered two qualifying felony convictions, an offender commits a third qualifying felony, the Three Strikes law presumes he or she is incorrigible and requires a life sentence." (*People v. Vargas* (2014) 59 Cal.4th 635, 638.) This is because the offender has "been afforded two previous chances to reform his or her antisocial behavior." (*Ibid.*) In this case, the defendant was given not just two previous chances to reform his behavior, but three. Defendant previously incurred a third strike, only to get a fourth chance when his sentence was recalled under Proposition 36. Nevertheless, defendant subsequently committed a misdemeanor weapons offense involving a knife and yet another robbery (this one). That persistent recidivism puts defendant within the spirit of the Three Strike sentencing scheme and does not make his situation in any way extraordinary.

In asking the trial court to strike his prior robbery convictions, defendant relied primarily on the age of the two strikes: the first from the 1980s and the second from the 1990s.

These two strikes are indeed old, but defendant has rarely been out of custody since he was first incarcerated in the 1980s. Moreover, defendant engaged in criminal activities even while incarcerated. The passage of two decades since defendant incurred the first two strikes is thus not a mitigating factor because defendant “did not refrain from criminal activity during that span of time, and he did not add maturity to age.” (*Williams, supra*, 17 Cal.4th at p. 163; see also § 667, subd. (c)(3) [“The length of time between the prior serious and/or violent felony conviction and the current felony conviction shall not affect the imposition of sentence”].)

The other arguments defendant made certainly warranted the trial court’s consideration, but the trial court did not abuse its discretion in concluding they were dwarfed by defendant’s long criminal history. Defendant asserted substance abuse was a contributing factor to his criminal career, noted he received no rehabilitation services in the past, and proposed that he could be conditionally released to a Veteran’s Administration program for rehabilitation. Defendant, however, showed no remorse for his crime or recognition of its seriousness. The trial court found he was also obstinate and disrespectful in the courtroom, and concluded this raised doubt as to whether defendant really would be amenable to rehabilitation. The trial court believed defendant posed a threat to society, and the Veteran’s Administration program provided only limited restrictions on participants’ movements. That no jury found defendant used a weapon in any of his three strike convictions does not establish an abuse of discretion. Reversal of the trial court’s decision is not warranted. (*Carmony, supra*, 33 Cal.4th at p. 376.)

C. Presentence Custody Credit

Defendant argues he is entitled to one additional day of presentence credit because the abstract of judgment wrongly lists his actual custody credit as 640, rather than 641, days. The Attorney General agrees defendant's presentence credit calculation requires correction. We concur defendant is entitled to an additional day of custody credit.

DISPOSITION

The clerk of the superior court shall prepare an amended abstract of judgment that gives defendant 737 days of presentence credit, consisting of 641 days of actual custody credit and 96 days of conduct credit, and deliver the amended abstract to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

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BAKER, J.

We concur:

KRIEGLER, Acting P.J.

DUNNING, J.*

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