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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRES GONZALEZ,

Defendant and Appellant.

A133995

(San Mateo County  
Super. Ct. No. SC072826A)

A jury convicted appellant Andres Gonzalez of petty theft with a prior conviction (Pen. Code, §§ 484, 666).<sup>1</sup> He admitted having suffered a prior felony strike conviction (§ 1170.12, subd. (c)(1)) and having served two prior prison commitments (§ 667.5, subd. (b)). The trial court denied Gonzalez's motion to strike the prior strike conviction sentencing enhancement (§ 1385) and sentenced him to state prison for a term of four years.

Gonzalez contends that the trial court abused its discretion in: 1) denying his request for a continuance of his trial; 2) permitting the prosecution to impeach his trial testimony with two prior felony convictions; and 3) refusing to dismiss his prior strike conviction for purposes of sentencing. We find no abuse of discretion and affirm.

**I. FACTUAL BACKGROUND**

Gonzalez was arrested on January 12, 2011, at the East Palo Alto Home Depot store. Loss Prevention Officer Erick Baltazar observed Gonzalez remove a \$249

<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

backpack leaf blower from its packaging, assemble it, and place the empty box back on a store shelf. Gonzalez later returned to where he had left the assembled leaf blower on the floor, retrieved it, and exited the store with it. Baltazar followed Gonzalez out of the store. When Baltazar identified himself as a Home Depot security officer, Gonzalez dropped the blower and tried to run. Gonzalez resisted when Baltazar apprehended him. The arrest was captured on surveillance video, which was played for the jury. Baltazar asked Gonzalez why he took the leaf blower, and Gonzalez said he owed a friend money. Later, Gonzalez said that he was trying to replace a friend's leaf blower that he had ruined. He apologized to Baltazar for taking the merchandise.

When searched by police, Gonzalez was found to have four Husky brand pressure hose connectors in his pocket. Gonzalez said he took them from the store. Gonzalez had no cash but did have his girlfriend's credit card.

Gonzalez testified in his own defense, and said that he drove his girlfriend's car to Home Depot, intending to shop for brass fittings for a compressor and for a leaf blower to replace one he had previously ruined. He opened the leaf blower box to make certain the box contained all items, putting the brass compressor fittings in his pocket while he inspected the leaf blower and assembled it. He put the leaf blower down to look for an employee who could answer his questions. He then picked up the leaf blower to take it to the customer service counter near the front entrance. He was looking for the garden center when he was "bear hugged" by Baltazar. He struggled because he did not know that Baltazar was a store security employee until he was handcuffed.

Gonzalez said that he did not know that he had left the store while he was searching for the garden center. He testified that he suffers from a virus in both eyes, making his eyes sensitive to light and that he sees a cornea specialist every three weeks for his eye condition. He said that he wore a baseball cap while inside the store to shield his eyes from the bright lights. He told the jury that the brim of the baseball cap prevented him from seeing signs much higher than eye level.

Gonzalez testified that he had \$25 in cash and a credit card he intended to use to make his purchases. He denied that he intended to take either the leaf blower or the

compressor fittings without paying for them. He admitted that he had been convicted of crimes of moral turpitude in 1999 and 2007. Gonzalez's girlfriend, Isabellita Sierra, testified that she allowed him to use her credit card to buy tools at Home Depot.

The jury found Gonzalez guilty. At sentencing, the trial court denied Gonzalez's motion to dismiss the strike allegation and imposed a four-year state prison sentence. Gonzalez filed a timely notice of appeal.

## II. DISCUSSION

### A. *The Continuance Motion*

Gonzalez's case was set for trial on October 24, 2011. On that date, the matter was assigned to a trial department. Defense counsel informed the trial court that a defense witness, "Dr. Christopher Ta," had been served with a subpoena, had not appeared, and had refused to be placed on telephone standby. The trial court ordered a body attachment for the witness, but stayed it pending further defense request. On October 25, 2011, the trial court addressed pending in limine motions and scheduled jury selection to commence the following morning.

On October 26, 2011, defense counsel moved to continue the trial. Counsel represented that defense witness Dr. Christopher Tai, Gonzalez's treating eye doctor, had been subpoenaed, but that requiring him to testify on short notice would create a hardship for the doctor and for his patients. Counsel asked that the trial be rescheduled to an indeterminate date so that the doctor could "block the time out." The prosecution objected that the request was untimely and failed to establish good cause.

The court denied the motion for continuance, noting for the record the procedural history of the case, with failures of Gonzalez to appear for scheduled hearings, including an earlier scheduled trial date. The court also noted the belated efforts by the defense to secure Dr. Tai's appearance. "It is not uncommon to have difficulty in getting doctors especially doctors who specialize in a particular field or area of medicine to get them to come to court. In this instance, given the nature and history particularly, in the case now, we are coming up on ten and a half months here since the offense, I don't really see efforts to have served Dr. Tai much prior to certainly this trial setting. There are no

reports from Dr. Tai indicating what his testimony will be as it relates to this case and how essential that would be to the defense. [Defense counsel] has expressed his concerns as to what the doctor may be able to testify to. In balancing the interest, I don't find that this requests [*sic*] constitutes good cause. There is no indication that even if I were to grant this continuance whatever the next setting is made by the court that Dr. Tai will number one, either be available, or two, would be able to testify during whatever window was that [defense counsel] might have arranged for the doctor. For example, if there are no trial departments available or if the matter were to trail we can have him set to testify on a particular date that may not be the date for testimony. There are other potential avenues that could have been explored such as those for trying to arrange for a conditional examination so that the District Attorney could have an opportunity to cross examine the doctor. I have seen that in many instances with medical specialists and that was not something that was pursued here. So a long story short, with that recitation, the motion to continue will be respectfully denied.”

Gonzalez contends that “by eliminating Dr. Tai as a witness, [he] was deprived of his only ostensibly objective witness, and denied the constitutional right to a meaningful opportunity to present a complete defense.”

1. *Standard of Review*

A continuance in a criminal trial may only be granted for good cause. (§ 1050, subd. (e).) “ ‘The trial court’s denial of a motion for continuance is reviewed for abuse of discretion.’ [Citation.] ‘There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.’ [Citations.]” (*People v. Mungia* (2008) 44 Cal.4th 1101, 1118.)

2. *Analysis*

What Gonzalez first ignores is the fact that the court did not “eliminat[e] Dr. Tai as a witness.” Dr. Tai was under subpoena, and the court said that it would issue a body attachment to compel his attendance if defense counsel requested it. Counsel did not

make that request, nor did he ask the court to allow Dr. Tai to be called out of order or otherwise accommodated to permit his testimony in this trial. Instead, counsel only asserted that requiring the doctor to testify in compliance with the subpoena would cause a hardship to Dr. Tai and to his patients, and he sought an open-ended continuance so that a later trial date could be calendared around Dr. Tai's schedule.

“In reviewing the decision to deny a continuance, ‘[o]ne factor to consider is whether a continuance would be useful. [Citation.]’ [Citation.]” (*People v. Mungia, supra*, 44 Cal.4th at p. 1118.) As the court observed, even if a continuance were granted, there was no assurance that Dr. Tai would then be available, or that he would be able to testify during “whatever the window was that [defense counsel] might have arranged for the doctor.”

Further, trial counsel's offer of proof indicated only that Dr. Tai would be able to confirm that Gonzalez suffered some sensitivity to light that affected his visual acuity, matters which were presented to the jury through Gonzalez's own testimony. Defense counsel specifically advised the court that he was not seeking to call Dr. Tai as an expert. As the People note, Dr. Tai would not have been able to testify as to what Gonzalez did or did not see while inside the Home Depot store on January 12, 2011, or whether or not Gonzalez knew he was leaving the store with unpaid merchandise on that date. Dr. Tai's testimony was hardly critical to Gonzalez's defense.

Finally, it was ultimately defense counsel's decision not to compel Dr. Tai's appearance. It is therefore difficult to see how Gonzalez suffered prejudiced as a consequence of *denial of the continuance*. We find no abuse of discretion

#### B. *Impeachment*

Before trial, the prosecution moved to impeach Gonzalez, if he chose to testify, with two prior felony convictions, including a 1999 Santa Clara County conviction for robbery (§§ 211, 212.5); and a 2007 San Mateo County conviction for second degree burglary (§§ 459, 460, subd. (b)). Gonzalez's counsel argued that the priors should be excluded under Evidence Code section 352 as more prejudicial than probative, and that the 1999 conviction was “stale.”

The court found that both prior offenses involved moral turpitude. It then set forth its analysis of the Evidence Code Section 352 balancing factors in determining “whether or not the probative value is substantially outweighed by the prejudicial effect and whether there is a substantial danger of undue prejudice, confusion of the issues, or misleading the jury. The focus here obviously being on the prong that relates to potential prejudice. Also, making a determination as to its remoteness whether it’s similar to the conduct alleged in the current offense and whether its admission would have effect upon a defendant’s decision to testify. . . . So I have taken all of those factors into account as well as the considerations that are set forth [in *People v. Castro* (1985) 38 Cal.3d 301]. What I have decided in this matter is to balance these issues and balancing . . . the reasoning behind the amendment to the constitution the so called fruit and evidence bill that amended Article One, Section 28. I am going to find that the prior convictions are admissible for the purposes of impeachment should Mr. Gonzalez choose to testify. However, I think in balancing and the fairness would be to allow the impeachment to be asking the question to Mr. Gonzalez as to whether or not he was convicted of a felony offense involving moral turpitude on November 22nd, 1999. And then the same would hold true as to the felony conviction involving moral turpitude on the 7th of August of 2007 rather than specifically delineating the offense. . . . Given anything that was laid out here on the record, the only issue as it relates to the robbery conviction that I felt was a closer call was the remoteness of that. However, in light of the totality of the record that was described here and the relatively ongoing conduct, I don’t find that to be too remote such that it be excluded.”

As previously noted, Gonzalez was impeached with the two “moral turpitude” felonies when he testified. The jury was instructed that they could only consider such evidence for the limited purpose of assessing credibility. (CALCRIM No. 303.) Gonzalez complains that “[h]is credibility as a witness *for himself* was negated and his otherwise plausible defense obliterated.”

1. *Standard of Review*

“ ‘Past criminal conduct involving moral turpitude that has some logical bearing on the veracity of a witness in a criminal proceeding is admissible to impeach, subject to the court’s discretion under Evidence Code section 352.’ [Citations.]” (*People v. Smith* (2007) 40 Cal.4th 483, 512.) Article I, section 28, subdivision (f) of the California Constitution further “provides in pertinent part that ‘[a]ny prior felony conviction . . . shall subsequently be used without limitation for purposes of impeachment . . . in any criminal proceeding. . . .’ ” (*People v. Wheeler* (1992) 4 Cal.4th 284, 292.)

“[N]otwithstanding this constitutional provision, a trial court retains discretion under Evidence Code section 352 to preclude the use of a prior conviction for the purpose of impeachment if the probative value of the conviction is outweighed by its prejudicial effect. [Citation.]” (*People v. Black* (2007) 41 Cal.4th 799, 810.) Thus, “ ‘always subject to the trial court’s discretion . . . , [article I, section 28, subdivision (f) of the California Constitution] authorizes the use of any felony conviction which necessarily involves moral turpitude, even if the immoral trait is one other than dishonesty.’ ” (*People v. Hinton* (2006) 37 Cal.4th 839, 888.) In exercising its discretion under Evidence Code section 352, “the trial court must consider four factors identified by our Supreme Court in *People v. Beagle* (1972) 6 Cal.3d 441, 453 . . . : (1) whether the prior conviction reflects adversely on an individual’s honesty or veracity; (2) the nearness or remoteness in time of a prior conviction; (3) whether the prior conviction is for the same or substantially similar conduct to the charged offense; and (4) what the effect will be if the defendant does not testify out of fear of being prejudiced because of the impeachment by prior convictions. [Citation.] These factors need not be rigidly followed. [Citation.]” (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925.) As the Supreme Court has explained, “We made plain [in *People v. Castro, supra*, 38 Cal.3d 301] that in exercising their discretion, trial court’s should continue to be guided—but not bound—by the factors set forth in *People v. Beagle*[, *supra*,] 6 Cal.3d 441, and its progeny. [Citations.]” (*People v. Clair* (1992) 2 Cal.4th 629, 654, parallel citations omitted.)

“ ‘[T]he trial courts have broad discretion to admit or exclude prior convictions for impeachment purposes. . . . The discretion is as broad as necessary to deal with the great variety of factual situations in which the issue arises, and in most instances the appellate courts will uphold its exercise whether the conviction is admitted or excluded.’ [Citation.]” (*People v. Hinton, supra*, 37 Cal.4th at p. 887.)

## 2. *Analysis*

The record here shows a careful balancing by the trial judge of the relevant factors, and efforts by the trial court, through redaction of the specific nature of the prior offenses, to minimize any undue prejudice to Gonzalez. Gonzalez’s testimony was not entitled to a “ ‘ “false aura of veracity” ’ ” by exclusion of his felony convictions. (See *People v. Hinton, supra*, 37 Cal.4th at p. 888.) No abuse of discretion is shown.

## C. *Romero Motion*

At sentencing, Gonzalez made a motion to dismiss the allegation of his prior strike conviction. The trial court denied the motion, setting forth at some length its reasons for doing so. The court noted that Gonzalez had committed new offenses while on probation for other felonies, and that in 2007 Gonzalez had been given what the court termed “frankly, some extraordinary relief” in having a strike stricken, allowing him to be placed on probation with a suspended prison sentence and placement in a residential drug treatment program. And the court observed that Gonzalez, less than three months after completing probation in that case, committed the instant offense. The court also expressed its concern with Gonzalez’s lack of candor, both at trial and in his posttrial statements to the probation department. The court told Gonzalez that “you get very close . . . to what I would classify very easily as a sociopath.”

The court stated that it had “very carefully weighed and considered the factors that are set forth under [*People v. Superior Court (Romero)* (1996)] 13 Cal.4th 497 as well as the case of the [*People v. Garcia* (1999)] 20 Cal.4th 490 and all of their respective progeny.” In denying the motion, it found “that there are no unusual circumstances which warrant that exercise of extraordinary discretion.”

Gonzalez argues that the decision to deny dismissal of the strike, and his resulting four-year sentence was “unjust,” contending that Gonzalez is a “low-level offender” deserving of lesser punishment. He also contends that the state’s “fiscal realities” dictate that he should not be assigned to one of the available cells or beds in state prison.

1. *Standard of Review*

A trial court may, “in furtherance of justice” pursuant to section 1385, subdivision (a), dismiss an allegation or finding under the three strikes law that a defendant has previously been convicted of a serious and/or violent felony. (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*); *People v. Williams* (1998) 17 Cal.4th 148, 158 (*Williams*); *Romero, supra*, 13 Cal.4th at p. 504.)

In *Romero*, our Supreme Court ruled that trial courts have the discretion under section 1385 to strike a prior conviction in furtherance of justice. (*Romero, supra*, 13 Cal.4th at p. 531.) In *Williams, supra*, 17 Cal.4th 148, the high court articulated the factors trial courts should evaluate when exercising discretion under section 1385: “[T]he court in question 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, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*Id.* at p. 161.) The three strikes law establishes a sentencing norm, and “it carefully circumscribes the trial court’s power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper.” (*Carmony, supra*, 33 Cal.4th at p. 378.)

A trial court’s refusal to dismiss or strike a prior serious and/or violent felony conviction allegation under section 1385 is reviewed under a deferential abuse of discretion standard. (*Carmony, supra*, 33 Cal.4th at p. 376.) “In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ‘[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or

arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” ’

[Citations.] Second, a ‘ “decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’ ” ’ [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at pp. 376–377.)

## 2. *Analysis*

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.’ ” (*Carmony, supra*, 33 Cal.4th at p. 378.) “Because the circumstances must be ‘extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack’ [citation.], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary.” (*Ibid.*) This is not such a case, and no abuse of discretion is shown.

**III. DISPOSITION**

The judgment is affirmed.

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Bruiniers, J.

We concur:

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Simons, Acting P. J.

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Needham, J.