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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD KYLE JOHNSON,

Defendant and Appellant.

B229026

(Los Angeles County
Super. Ct. No. BA354957)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Monica Bachner, Judge. Affirmed.

Janet J. Gray, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and
Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Richard Kyle Johnson appeals from the judgment entered following his conviction after a jury trial on two counts of robbery. In a bifurcated proceeding, Johnson admitted having suffered one prior serious or violent felony conviction within the meaning of Penal Code section 667, subdivision (a)(1)¹ and the Three Strikes law (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)), and having served five separate prison terms for felonies (§ 667.5, subd. (b)). The trial court sentenced Johnson to an aggregate state prison term of 15 years. He contends the trial court erred by failing to instruct sua sponte on theft as a lesser included offense of robbery and by abusing or misunderstanding the scope of its discretion when it failed to dismiss a prior strike conviction (Pen. Code, § 1385; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero* motion)). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Trial*

On the morning of April 3, 2009, Johnson entered a recycling center where, earlier, he had watched employee Mike Ashotyan purchase recyclable material from customers in the parking lot. Ashotyan carried the cash for these relatively small transactions in his shirt and pants pockets. Johnson approached, pointed a gun at Ashotyan, and said, “Give me your money.” Before Ashotyan responded, Johnson pulled some \$20 bills from Ashotyan’s shirt pocket, ripping it in the process, and ordered Ashotyan to surrender all of his money. Ashotyan complied, handing over \$50 in one-dollar bills from his pants pocket. Ashotyan was scared, aware that Johnson’s gun was trained on him throughout the encounter.²

Johnson headed towards the gate of the recycling center where several customers were waiting for Ashotyan. Among them was Marvin Garcia, who saw Johnson demand

¹ Statutory references are to the Penal Code.

² At trial, Ashotyan testified he “had doubts” at the time that the gun was real, but he did not want to risk getting hurt, if he was wrong. Had Ashotyan been certain that it was not “a real gun,” he would not have given Johnson the money.

money from Ashotyan at gun point and then reach into Ashotyan's shirt pocket. Johnson confronted Garcia, pointed his gun and said, "Give me your cell phone." Frightened, Garcia complied, and Johnson left.

Garcia followed Johnson out of the recycling center and down the street, and Ashotyan telephoned police. When police arrived shortly thereafter, Garcia had already returned, and he and Ashotyan described Johnson to police. Officers detained Johnson, who was separately identified by Ashotyan and Garcia as the robber. The police recovered a BB gun, \$50 in one-dollar bills and Garcia's cell phone.

Johnson neither testified nor presented other evidence in his defense. The parties stipulated that Johnson received a monthly benefit check from the Social Security Administration and other assistance; and there was no evidence that Johnson had cashed any such checks after January 30, 2009.

2. *Sentencing Hearing*

Prior to sentencing, Johnson filed a *Romero* motion to dismiss his prior strike conviction for robbery, which the trial court read and considered. In the motion, Johnson contended his 1993 conviction was remote, and his lengthy criminal history, which was nonviolent, was attributable to his serious mental illness,³ his chronic drug and alcohol abuse and his tumultuous upbringing. At the hearing, defense counsel added that in none of Johnson's prior convictions was there a finding that he had used a weapon to commit the offense.

According to the probation report, which the trial court also read and considered, Johnson was 51 years old at the time of the robberies. His criminal history began in 1987 when he was convicted of misdemeanor assault with a deadly weapon, for which he was sentenced to 45 days in county jail. Thereafter, Johnson was convicted of a series of misdemeanor offenses (vandalism in 1991, embezzlement by an employee in 1991, attempted burglary in 1992), for which he was sentenced to various terms in county jail.

³ Criminal proceedings in this case were suspended at least four times, when the trial court declared a doubt as to Johnson's competence to stand trial (§ 1369).

In 1992, Johnson was convicted of his first felony offenses, two counts of burglary, and was placed on 36 months of probation. In 1993, he was convicted of robbery (his prior strike conviction) and sentenced to three years in state prison. Johnson was convicted of burglary in 1995, 1997, 2003, 2007 and 2008; each time he was sentenced to state prison. In 2001, Johnson was convicted of grand theft, and in 2005 he was convicted of forgery. State prison terms were imposed. Over the years, Johnson was also committed to Patton State Hospital after being declared mentally incompetent, and he was found in violation of parole. He was on parole when he committed his latest robbery. The probation report listed seven factors in aggravation and no factors in mitigation and recommended no probation and the imposition of the upper term.

After listening to argument by counsel, the trial court denied the *Romero* motion. The court acknowledged that while it had the discretion to dismiss the 1993 robbery conviction as remote, this offense was the first in a pattern of felonious conduct, albeit nonviolent, resulting in repeated state prison commitments. The trial court then sentenced Johnson as a second strike offender to two concurrent terms of 10 years (double the five-year upper term for robbery), and one five-year enhancement for the prior serious felony conviction. The court stayed sentencing on the one-year prior prison term enhancements.

DISCUSSION

1. The Trial Court Was Not Required to Instruct the Jury on Theft, a Lesser Included Offense of Robbery

Johnson is not challenging the sufficiency of the evidence to support the robbery convictions. Instead, he contends the trial court erred by not instructing sua sponte on theft, a lesser included offense of robbery.

The trial court must instruct on necessarily included offenses when the evidence raises a question whether all the elements of the charged offense are present, and there is substantial evidence that would justify instead a conviction of a lesser offense. (*People v. Gray* (2005) 37 Cal.4th 168, 219 [insufficient evidence defendant committed theft as

opposed to the greater offense of robbery].) ““Substantial evidence” in this context is “evidence from which a jury composed of reasonable [persons] could . . . conclude[]” that the lesser offense, but not the greater, was committed. [Citations.]’ [Citation.]” (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.) “A trial court need not, however, instruct on lesser included offenses when the evidence shows that the defendant is either guilty of the crime charged or not guilty of any crime (for example, when the only issue at trial is the defendant’s identity as the perpetrator). Because in such a case ‘there is no evidence that the offense was less than that charged [citation], the jury need not be instructed on any lesser included offense.” (*People v. Barton* (1995) 12 Cal.4th 186, 196, fn. 5; accord *People v. Gutierrez* (2009) 45 Cal.4th 789, 825-826.) “[M]ere speculation [that] the crime was less than that charged is insufficient to trigger the duty to instruct.” (*People v. Gray, supra*, 37 Cal.4th at p. 219.)

Theft is a lesser and necessarily included offense in robbery; robbery has the additional element of a taking by force or fear. (§ 211; *People v. DePriest* (2007) 42 Cal.4th 1, 50.) Johnson claims there was evidence he did not use force or fear because: (1) he merely reached into Ashotyan’s shirt pocket to remove the cash, before Ashotyan could react; (2) Ashotyan testified to having “had some doubts” about whether the gun used was real; and (3) Garcia may not have been truly afraid at the time because he followed Johnson out of the recycling center and into the neighborhood.

The uncontroverted evidence supports a finding of only one theft-related offense as to both counts, and that is robbery. If a crime were committed against Ashotyan and Garcia, force and/or fear were used in its perpetration. The testimony of each victim, if believed, established that he relinquished his property because Johnson demanded it at gunpoint. Accordingly, the evidence did not require an instruction on theft.

2. *The Trial Court Did Not Abuse or Misunderstand the Scope of Its Discretion in Denying the Romero Motion*

Section 1385, subdivision (a), vests the court with discretion to dismiss a prior conviction, including a qualifying strike conviction, “in furtherance of justice.” (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 530; *People v. Williams* (1998) 17

Cal.4th 148, 158.) “[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law . . . or in reviewing such a ruling, the court . . . must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [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.” (*Williams*, at p. 161.)

We review the trial court’s decision not to dismiss a prior strike allegation under section 1385 for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) “[T]he three strikes law not only establishes a sentencing norm, 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. [¶] . . . [¶] . . . ‘[I]t is not enough to show that reasonable people might disagree about whether to strike one or more’ prior conviction allegations. . . . 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.” (*Id.* at p. 378.)

We reject Johnson’s claim the trial court either abused or misunderstood the scope of its discretion to dismiss his prior strike conviction, by focusing exclusively or inordinately on his criminal history in denying his *Romero* motion. The court considered Johnson’s 1993 robbery conviction in conjunction with his criminal history and the nature and circumstances of his current offenses. Indeed, the court noted that despite the fact Johnson’s prior strike conviction could be dismissed as remote, and his criminal history was apparently nonviolent, the record established Johnson to be a recidivist with

poor prospects for the future. Under such circumstances, a trial court does not abuse its discretion in refusing to dismiss a prior strike conviction, even where, as here, that conviction is a number of years old. (See *People v. Williams*, *supra*, 17 Cal.4th at pp. 162-164 [abuse of discretion to dismiss 13-year-old prior where there is little or nothing favorable in defendant's background, record, character or prospects].)

Johnson contends, however, that the trial court ignored the particulars of his background, which placed him outside the primary purpose of the Three Strikes law. Specifically, Johnson faults the court for failing to consider, because it failed to address, his severe mental illness, his efforts to self-medicate by substance abuse, and his tumultuous upbringing.⁴ However, these factors were before the court through the *Romero* motion and the probation officer's report, which the court indicated it had reviewed. We presume the court considered them since the record does not affirmatively reflect otherwise; it is not necessary for the trial court to address each independently. (*People v. Evans* (1983) 141 Cal.App.3d 1019, 1022.) The trial court did not abuse its discretion in concluding Johnson did not fall outside the Three Strikes law.

⁴ Johnson's argument relies in part on *People v. Cluff* (2001) 87 Cal.App.4th 991. However, that decision does not assist Johnson. Cluff had been convicted of several counts—all strikes—of molesting young boys. He served a substantial prison term and registered as a sex offender but was later convicted of failing to update his sex offender registration on an annual basis pursuant to a law that took effect five years after he had been paroled. He was sentenced to 25 years to life pursuant to the Three Strikes law. (*Id.* at p. 994.) The Court of Appeal vacated Cluff's sentence and remanded the case to the trial court to conduct a new hearing on the *Romero* motion. (*Cluff, supra*, 87 Cal.App.4th at p. 1005.) The appellate court explained the trial court had denied the *Romero* motion in reliance on an unsupported inference that the new offense was not, in fact, a mere technical violation of a newly revised statute, but that Cluff had knowingly and deliberately failed to update his registration for the purpose of concealing his true residence from law enforcement. (*Id.* at pp. 1002-1004.) After analyzing the evidence in the record, the Court of Appeal concluded the trial court's adverse inference was not supported by substantial evidence and the lower court had abused its discretion by denying the motion on that ground. (*Ibid.*) The trial court made no such erroneous inference here.

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.