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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES RICHARD KEY,

Defendant and Appellant.

B229837

(Los Angeles County
Super. Ct. No. KA089260)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Richard M. Goul, Judge. Affirmed as modified.

Brian A. Wright, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Scott A. Taryle and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff
and Respondent.

INTRODUCTION

A jury found defendant and appellant James Richard Key guilty of assault with a deadly weapon and of kidnapping. After the trial court denied defendant's motion to strike his 40-year-old prior conviction under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), the trial court doubled his sentence based on that strike. Defendant now contends that the trial court abused its discretion by denying his *Romero* motion. He also contends that his sentence on a great bodily enhancement allegation under Penal Code section 12022.7, subdivision (e),¹ must be modified. We hold that the trial court did not abuse its discretion by denying defendant's *Romero* motion, but we modify the judgment to correct the term imposed under section 12022.7.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. Prosecution case.

In January 2010, Deborah Z. was homeless, living off and on in shelters. She had met defendant in 2009 on the streets. They became friends, and sometimes she slept in his camper. Michael Kozna and his fiancée, Tamara Higley, were also homeless, and they too were defendant's friends.

On January 7, 2010, Kozna and Higley heard defendant make sexual remarks about Deborah, saying she had better put out or get out. When defendant made the remark, he was angry about \$20 Deborah had—defendant felt that he deserved some of the money because he gave food and shelter to Deborah.

That same day, January 7, 2010, Deborah and defendant had dinner together at a shelter. Later, they watched a movie in his camper. Deborah fell asleep but was awakened by defendant's screams. He hit her head with a metal baseball bat and tried to suffocate her with a gray cloth. Defendant removed the cloth and said he would take Deborah to the hospital, but first he was going to “ ‘fuck’ ” her. He removed her overalls and put his finger and tongue in her vagina and licked her face.

¹ All further undesignated statutory references are to the Penal Code.

Deborah said she needed to use the bathroom, and while she was in the bathroom, Kozna and Higley knocked on the door. They could hear Deborah screaming for help from inside the camper. Defendant told Kozna to go away, that he was dealing with a “ ‘crazy bitch.’ ”² Deborah pulled down a curtain, hoping someone would see her, but defendant forcibly made her get into the front passenger seat. Defendant drove away, but Deborah, who was naked from the waist down, jumped out of the car at a stop sign. Weak, she held onto the camper door, and defendant turned the car to run over her legs.

Michael George found Deborah, unconscious, lying in the street. She had tire marks on her legs, and, according to the responding officer, blood pouring from the back of her head.

When officers stopped defendant in his camper, he was not wearing shoes or socks, his shirt was unbuttoned, and his pant’s zipper was down. Blood was on his lower left pant leg, right armpit, and the front left side of his shirt, although he appeared to be uninjured. In the camper, officers found a bloodied metal bat lying next to a fresh pool of blood, overalls with blood on them, and Deborah’s white shirt.

A forensic nurse, examined Deborah, who had scraped knees, a bruise on her left arm, a bruise under her right eye, and dried blood near her mouth area. She also had multiple pelvic fractures, spinal fractures, scalp hematoma, and abrasions to her hip, knees, right flank and elbow. The nurse did not see bruises or trauma to Deborah’s genital area, but she took swabs from her external and internal vaginal area and from her face. The YDNA profile from the external genital sample matched defendant’s DNA profile. Approximately 1 in 1,047 unrelated Caucasian males have that profile. Only partial profiles were obtained from the internal vaginal and oral samples.

B. *Defense case.*

Deborah has a history of mental problems, believing that she is a hostage negotiator and that her mother is a former Supreme Court justice. She accused defendant of carrying a dog “serum” that he would put on food. While defendant was in jail in

² Kozna called 911, saying Deborah was being “raped.”

California, Deborah, who was in Pennsylvania, called 911 to report that defendant was in her home. She explained at trial that he used a “stand in[]” and a “mask.”

Deborah’s mother testified that she is not a judge. To her knowledge, Deborah has never taken medication, and she does not know what her daughter has been diagnosed with, although she has tried to get Deborah help. Although Deborah sometimes says wacky things, her mother believes that defendant attacked Deborah.

Defendant testified that Deborah lived with him in his camper. She flew into nightly rages, sometimes accusing him of sleeping with her mother and sister. The night of January 7, 2010, he went to bed, and Deborah left to use the bathroom at Food4Less. When she returned, she “flipped out,” accusing defendant of sleeping with her mother and sister. She removed her pants and kicked defendant, so he grabbed a bat and hit her. Remorseful, he helped her into the front seat and tried to drive her to the hospital, but she jumped out of the car at a stop sign and he accidentally ran over her.

II. Procedural background.

On November 22, 2010, the jury found defendant guilty of count 1, assault with a deadly weapon (§ 245, subd. (a)(1)) and found true an allegation that defendant personally inflicted great bodily injury on the victim (§ 12022.7), and of count 4, kidnapping (§ 207, subd. (a)). The jury found him not guilty of count 2, sexual penetration by a foreign object (§ 289, subd. (a)(1)). The jury deadlocked on count 3, forcible oral copulation (§ 288a, subd. (c)(2)); count 5, assault with a deadly weapon (§ 245, subd. (a)(1));³ and count 6, attempted murder (§§ 187, subd. (a), 664). The trial court declared a mistrial on those counts.

Defendant moved, under *Romero, supra*, 13 Cal.4th 497, to strike a prior felony conviction from 1970. The trial court denied the motion, and, on December 8, 2010, sentenced defendant to the high term of 8 years on count 4, doubled to 16 years under the Three Strikes law, to 1 year doubled to 2 years on count 1, and to 1 year 4 months under section 12022.7, subdivision (e).

³ This count concerned the allegation that defendant ran over the victim with his motor home.

DISCUSSION

III. The trial court did not abuse its discretion by denying defendant's *Romero* motion.

Under the Three Strikes law, the trial court doubled defendant's 8-year sentence on count 4 (kidnapping) to 16 years and his 1-year sentence on count 1 to 2 years, having denied defendant's *Romero* motion to strike his prior conviction. Defendant contends that because his prior strike occurred 40 years ago, the court abused its discretion by denying his motion. We disagree.

In the furtherance of justice, a trial court may strike or dismiss a prior conviction allegation. (§ 1385, subd. (a); *Romero, supra*, 13 Cal.4th at p. 504.) We review a trial court's refusal to strike a prior conviction allegation under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374-375.) Under that standard, the party seeking reversal must " 'clearly show that the sentencing decision was irrational or arbitrary. [Citation.]' " (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) It is not enough to show that reasonable people might disagree about whether to strike a prior conviction. (*Carmony*, at p. 378.) Only extraordinary circumstances justify a finding that a career criminal is outside the Three Strikes law. (*Ibid.*) Therefore, "the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the [T]hree [S]trikes scheme must be even more extraordinary." (*Ibid.*)

When considering whether to strike prior convictions, the relevant factors a court must consider are "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." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) The Three Strikes law "not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm [T]he law creates a strong presumption that any sentence that conforms to these

sentencing norms is both rational and proper.” (*People v. Carmony, supra*, 33 Cal.4th at p. 378.) We presume the trial court considered all of the relevant factors in the absence of an affirmative record to the contrary. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

Here, defendant’s contention that the trial court abused its discretion rests on the remoteness of his prior conviction, which occurred 40 years ago, in 1970. A prior conviction may be stricken if it is remote in time, but a trial court “should not simply consult the Gregorian calendar with blinders on.” (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.) *Humphrey* suggested there might be a “ ‘washing out’ ” period; namely, “a crime-free cleansing period of rehabilitation after a defendant has had the opportunity to reflect upon the error of his or her ways.” (*Ibid.* [although defendant’s strike was 20 years old, he was not entitled to a “ ‘washing out’ ” because he continued to lead a life of crime].)

It would appear, at first blush, that if any case is worthy of applying such a “ ‘washing out’ ” period this would be it. Defendant’s prior strike is 40 years old. And he has remained crime-free since 1980—for 30 years. But the abuse of discretion standard is a hard one for a defendant to meet. Our California Supreme Court has advised that a trial court abuses its discretion in failing to strike a prior felony conviction in limited circumstances; for example, where the trial court was unaware of its discretion to dismiss a strike or where it considered impermissible factors in declining to dismiss. (*People v. Carmony, supra*, 33 Cal.4th at p. 378.) Neither of those limited circumstances apply here.

Moreover, to reverse the decision of the trial court, the standard of review requires us to say that reasonable minds could not differ, that the trial court’s decision was “arbitrary” and “irrational,” that this is the “extraordinary” case—the exception to the rule. That defendant’s prior conviction is 40 years old and that he has been crime free for 30 years are certainly compelling facts, but they are not enough to overcome the standard of review. Although the trial court noted that defendant had been crime free for “20” (it was actually 30), the court concluded that given the violent nature of the prior offense

and that he did not remain crime free during the 1970's, the *Romero* motion should be denied. The record supports that conclusion. Defendant's prior conviction was assault with the intent to commit murder under section 217 (repealed by Stats. 1980, ch. 300, pp. 627-628, §§ 1, 2),⁴ and he was somewhat similarly convicted of assault with a deadly weapon in this current case. When he was released from prison in 1973, defendant did not remain crime free, committing these misdemeanors: (1) a hit and run and resisting a public officer in 1974; (2) drunk driving in 1977; (3) theft in 1977; and (4) drunk driving in 1980. In addition to his recidivism, albeit decades old, his current crimes of assault with a deadly weapon and kidnapping involved force and violence.

We therefore cannot conclude that the age of defendant's prior strike and that he was crime free for 30 years before committing the current crimes require us to reverse the judgment of the trial court.

IV. The sentence on the great bodily injury enhancement must be modified.

The trial court sentenced defendant to one year four months⁵ under section 12022.7, subdivision (e), which imposes a three-, four- or five-year term for personal infliction of great bodily injury under circumstances involving domestic violence. The jury, however, was not instructed on the domestic violence element of the enhancement and did not find that the circumstances here involved domestic violence. The jury simply found "true" that defendant personally inflicted great bodily injury on the victim.

Defendant therefore should have been sentenced under subdivision (a) of section 12022.7, which provides a three-year term. One-third of three years is one year. Defendant's sentence must therefore be reduced by four months.

⁴ The assault was apparently charged with a kidnapping, but defendant was found not guilty of that crime. No other facts concerning the prior conviction were available.

⁵ This was one-third the mid-term of four years.

DISPOSITION

The one year four months term imposed under section 12022.7, subdivision (e), is modified to a one-year term under section 12022.7, subdivision (a). The clerk of the superior court is ordered to modify the abstract of judgment and to forward the modified abstract of judgment to the Department of Corrections. The judgment is otherwise affirmed as modified.

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ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.