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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGAR EDUARDO PELAYO,

Defendant and Appellant.

B235429

(Los Angeles County
Super. Ct. No. BA376850)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Sam Ohta, Judge. Affirmed.

Verna Wefald, 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, Assistant Attorney General, Scott A. Taryle and Kimberley J. Baker-Guillemet, Deputy Attorneys General, for Plaintiff and Respondent.

Edgar Eduardo Pelayo, also known as Jose Bonilla and Edgar Bonilla, appeals from the judgment entered upon his conviction by jury of second degree murder (Pen. Code, § 187).¹ The jury found to be true the allegation that appellant used a dangerous weapon, a knife, within the meaning of section 12022, subdivision (b)(1). The trial court found to be true the allegations that appellant had suffered a prior felony strike within the meaning of sections 1170.12, subdivisions (a) thorough (d) and 667, subdivisions (b) through (i) and a prior prison term within the meaning of section 667.5, subdivision (b). After denying appellant’s *Romero*² motion, the trial court sentenced him to an aggregate state prison term of 32 years to life. Appellant contends that (1) there is insufficient evidence to support his conviction of second degree murder, and (2) the trial court abused its discretion in denying his *Romero* motion.

We affirm.

FACTUAL BACKGROUND

Background

In October 2010, appellant lived in a multi-level apartment on Winona Boulevard with his sister, Anna, and his younger brother, 32-year-old Phillip Pelayo (Phillip) (appellant and Phillip collectively “the brothers”). Jaime Ruiz (Ruiz), appellant’s 31-year-old nephew lived across the street with his family. Ruiz’s living room window had a clear view of the brothers’ apartment.

The murder

In the afternoon of October 10, 2010, the brothers were in their apartment, drinking alcohol and watching football. Between 4:00 and 4:30 p.m., Ruiz went to their apartment to ask Phillip for a ride to the market, as Ruiz did not have a car. Appellant

¹ All further statutory references are to the Penal Code unless otherwise indicated.

The jury found appellant not guilty of first degree murder.

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

was downstairs in the living room and appeared intoxicated and anxious. He demanded Ruiz drive him to “score some drugs.”³ Ruiz refused.

Ruiz went upstairs to Phillip’s bedroom. Phillip was lying in bed. Ruiz asked him for a ride to the store, but Phillip said he was “buzzed.” Ruiz said that he would walk. According to Ruiz, Phillip was not a violent person or a violent drunk. Ruiz had never seen him violent with appellant.

When Ruiz went downstairs to leave, appellant was at the foot of the stairs and again asked for a ride. He appeared to need drugs badly. Ruiz told him he would not take him anywhere. Appellant told Ruiz to wait while he went upstairs to get the car keys and said, “You know you’re going to take me, fucking asshole.” He touched Ruiz’s shirt. Ruiz responded, “There you go with that bullshit again.” Ruiz told appellant he was leaving and walked back to his apartment. It took Ruiz a minute or so to walk across the street, and as he did, he heard appellant yell loudly, “fuck.”

Petros Agazaryan (Agazaryan) lived next door to the brothers. A six to seven foot chain-link fence separated their properties. On the afternoon of October 10, 2010, Agazaryan was on the ground floor balcony with his children. He heard one of the brothers say, “I’m trying to sleep.” He then heard them fighting and what sounded like glass breaking and the word “motherfucker” exchanged. A fan fell from the brother’s second floor window onto his property, in front of his balcony. He screamed for the brothers to be careful and threw the fan back over the fence. One of the brothers yelled “sorry” from the window.

Shortly after arriving back at his apartment, Ruiz looked out his window and saw Phillip staggering down the driveway with blood on his shirt, holding his chest. Ruiz ran to Phillip, who collapsed, falling face first. Appellant was walking three to five feet behind Phillip.

³ It is unclear in whose car appellant wanted Ruiz to drive him, as Ruiz did not have a car.

Ruiz turned Phillip over, lifted his shirt and saw two stab wounds. Ruiz asked appellant, "What the fuck did you do to him." Appellant responded, "I barely touched him." Ruiz tried to put pressure on the wounds. Appellant made no attempt to help save Phillip. Instead, in response to Ruiz's last statement, appellant swung at him, grazing the top of his head. Ruiz ducked, got up and hit appellant twice. Appellant fell to the ground, hit his head on a parked truck, the right side of his body hitting the ground.

Appellant got up and went into his apartment, and Ruiz resumed helping Phillip. Appellant reemerged from the apartment wearing a different shirt. He did not speak with anyone or ask how Phillip was doing. He ran up the street, chased by Ruiz. Ruiz caught and tackled appellant. They rolled on the ground until appellant pushed Ruiz aside, got up and continued running. Ruiz eventually lost sight of appellant, and then kept calling appellant's cell phone, which calls were unanswered. Later, appellant called Ruiz back and said, "You fucking bitch. Fucking snitch. You're going to snitch on me?" Appellant then hung up the phone. Ruiz called him back, but appellant did not answer.

Phillip was transported to the hospital and died.

Appellant's flight and arrest

Appellant ran to an old friend, Edward Macias's (Macias), house. He was in a daze and appeared distraught, confused and intoxicated. He had a few scratches on his face and had blood on his shirt. He told Macias that he had gotten into a fight with his brother and stabbed him with a knife. He said that Phillip "got in his face," they argued, and appellant lost it and "just stuck him in the side."

Appellant told Macias that Macias had to take him to the bus depot. Appellant did not appear to Macias to be in his right mind. Macias told him that he needed to go to the police. Appellant said he would, but first needed time to think. Macias took him to the bus. Appellant demanded money from Macias, who gave him \$70. At the bus station, Macias bought one ticket to Calexico, in appellant's name. Appellant objected, and Macias put the ticket in Macias's name. Appellant told Macias that he loved Phillip. When Macias got home he saw a mug shot of appellant on the television, asking that anyone with information contact the police. Macias immediately did so.

On October 11, 2010, shortly after midnight, Officer Jose Loera, of the San Bernardino Police Department was directed to apprehend appellant from a bus bound for Mexico. He boarded the bus in San Bernardino and, based on the description he had received, approached appellant, who said, "I'm the one you're looking for."

Crime scene investigation

Criminalist Erol Ergun (Ergun) recovered "a knife with red stains and about a five-inch blade with a black handle" from the kitchen floor. The blood on the knife matched Phillip's blood. Blood was found in the kitchen, in the first floor bathroom and leading outside the apartment. No blood was found upstairs. A pair of blue shorts and black Nike Air shoes were found with red stains on them. The shoes screened positive for blood.

Detective Timo Illig responded to the crime scene that evening. He believed that there had been some kind of struggle in the brothers' bedroom. The police found a fan on Phillip's bed that was missing a fan cover and that was still spinning. A fan cover was leaning against the fence in the yard below. A lampshade was on the bed and a broken wooden, rosary was on the floor to the right of the bed. The lamp was outside on the ground near the fan cover.

Appellant had a bruise on the left side of his back and a mark on his left arm.

The autopsy

The autopsy on Phillip revealed two fatal stab wounds to his chest. The stab wound that was higher on the chest cut through bone in the rib cage, tore the pericardial sac around the heart and made three unconnected cuts inside the heart, the deepest of which was three and one-half inches. These three wounds could have occurred if the knife was pulled out a bit, moved and reinserted or if Phillip had moved his body.

The second stab wound went through Phillip's diaphragm and cut the left side of his liver. In order to pierce the diaphragm and strike the liver, a degree of force would be required because "the diaphragm is a very tough muscle, and it's very difficult to get through. Even with a scalpel blade, you have to use force to, obviously, cut it." Phillip also had what could have been "defensive" injuries to his arms and hands. He had

abrasions on his lips and chin. Injuries on Phillip’s knuckles were consistent with his having punched someone or something. Phillip’s blood alcohol level was .17.

DISCUSSION

I. Sufficiency of the evidence

A. Contention

Appellant contends that there is insufficient evidence to support his conviction of second degree murder. He argues that there was “absolutely no evidence presented of express malice” and insufficient evidence of implied malice, as there was no evidence of “what appellant was thinking at the time of the fight or what precipitated the fight . . . [or] that appellant knew his conduct endangered life and acted with a conscious disregard for life.” He therefore asks that we reduce his conviction to voluntary manslaughter. We find that there was sufficient evidence to support the second degree murder conviction and therefore decline to reduce it.

B. Standard of review

“In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Hovarter* (2008) 44 Cal.4th 983, 996–997.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) This standard applies whether direct or circumstantial evidence is involved. (*People v. Catlin* (2001) 26 Cal.4th 81, 139.)

C. Elements of second degree murder

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) Second degree murder is the unlawful killing of a human being with malice aforethought that is not willful, deliberate and premeditated. (§§ 187, subd. (a), 189; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.)

Malice may be express or implied. (§ 188; *People v. Nieto Benitez*, *supra*, 4 Cal.4th at p. 102.) Express malice exists when there is a “deliberate intention unlawfully to take away the life of a fellow creature.” (§ 188.) Implied malice exists “when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart” (§ 188), or when one deliberately commits an intentional act naturally dangerous to human life knowing “that his conduct endangers the life of another and who acts with conscious disregard for life.” (*People v. Lasko* (2000) 23 Cal.4th 101, 107; *People v. Martinez* (2003) 31 Cal.4th 673, 684.) Implied malice requires that the defendant act with a wanton disregard for the high probability of death (*People v. Schmies* (1996) 44 Cal.App.4th 38, 46, fn. 4), thereby requiring a *subjective awareness* of a high degree of risk. (*People v. Watson* (1981) 30 Cal.3d 290, 296, disapproved on other grounds in *People v. Sanchez* (2001) 24 Cal.4th 983, 991, fn. 3.) It is not enough that a *reasonable person* would have been aware of the risk. (*People v. Watson*, *supra*, at pp. 296–297.)

Malice may be, and usually must be, proved by circumstantial evidence. (See *People v. Lashley* (1991) 1 Cal.App.4th 938, 945–946; *People v. James* (1998) 62 Cal.App.4th 244, 277.) “One who intentionally attempts to kill another does not often declare his state of mind either before, at, or after the moment he shoots. Absent such direct evidence, the intent obviously must be derived from all the circumstances of the attempt, including the putative killer’s actions and words. Whether a defendant possessed the requisite intent to kill is, of course, a question for the trier of fact.” (*People v. Lashley*, *supra*, 1 Cal.App.4th at pp. 945–946.)

D. Evidence of express and implied malice sufficient here

Though conviction of second degree murder requires no proof of actual intention to take life (*People v. Butts* (1965) 236 Cal.App.2d 817, 827), there is ample circumstantial evidence here of such intent to kill (express malice), as well as awareness of the risk to life and action in conscious disregard of it (implied malice).

At the time of Phillip’s murder, appellant was anxious and in need of drugs. He asked his nephew Ruiz, who had come to the brothers’ apartment from his residence

across the street, to take him to purchase drugs, but Ruiz refused. Appellant became angry. Phillip was upstairs lying in his bed and was “buzzed.” When Ruiz left the brothers’ house, appellant headed upstairs.

Agazaryan, the brothers’ next door neighbor, heard one of the brothers, presumably Phillip, who was in bed, yell, “I’m trying to sleep.” He then heard yelling and glass breaking and the word “motherfucker” exchanged. He saw a fan come flying from the brothers’ second floor window onto Agazaryan’s property.

When Ruiz arrived back at his apartment, from his window he saw Phillip exit his apartment holding his chest, followed closely by appellant. Ruiz ran to Phillip who collapsed and fell.

The nature of Phillip’s wounds fully support an inference that appellant intended to kill him or acted with the subjective awareness of the risk that he might do so, even if that was not his intention. Appellant stabbed Phillip not just once but twice in the chest area, known to house vital organs. The deepest of the cuts was three and one-half inches. One stab struck Phillip’s heart and the other struck his liver. Both stab wounds required substantial force to pierce through bone in the rib cage and cartilage and cut the heart three times, suggesting more than an effort to simply fend off an attacker. The stab wound that caused three separate cuts to Phillip’s heart, according to the medical examiner, was consistent with pulling the knife out a bit and then moving and reinserting it. This type of forceful attack with deep thrusts of the knife into Phillip supports an inference that it was an attempt to inflict deadly injuries and did not appear to be minor defensive cuts aimed at dissuading an aggressor. Phillip also had what could have been defensive wounds on his arms and hands and abrasions on his face.

Just as shooting at a person from very close range is a strong indicator of an intent to kill (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690; *People v. Lashley, supra*, 1 Cal.App.4th at p. 945 [“The very act of firing a .22-caliber rifle toward the victim at a range and in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill. . . .” Shooting at point blank range “undoubtedly creates a strong inference that the killing was intentional”]), so too is

forcefully stabbing a person in areas of the body known to house vital organs. When it is proved that the defendant assaulted the victim with a dangerous weapon in a manner endangering life and resulting in death, “malice is implied from such assault in the absence of justifying or mitigating circumstances.” (*Jackson v. Superior Court* (1965) 62 Cal.2d 521, 525.)

Appellant’s conduct after the stabbing further buttressed the jury’s finding of intent to kill Phillip or conscious disregard for Phillip’s life. As Phillip staggered out of the apartment with appellant close behind, appellant showed no remorse or concern for the brother he later claimed to love. Appellant made no effort to render aid to Phillip and even distracted Ruiz, who was aiding Phillip, by swinging his fist at Ruiz when Ruiz asked appellant what he had done. After Ruiz hit appellant twice, appellant went inside his residence, changed his clothes, and fled to a friend’s house, reflecting a consciousness of guilt. He admitted to his friend that Phillip “got in his face,” they argued and appellant “lost it” and “just stuck him in the side.” Appellant attempted to flee to Mexico but was arrested when his bus was intercepted by a San Bernardino police officer. When the officer boarded the bus, appellant said, “I’m the one you’re looking for.”

These facts fully support the jury finding beyond a reasonable doubt that appellant had either express or implied malice when he stabbed Phillip multiple times.

II. *Romero* motion

A. Background

Appellant’s criminal record as reflected in the probation report was as follows: (1) May 1987 conviction of possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) for which he received 36 months probation, (2) December 1989 conviction of kidnapping (§ 207, subd. (a)) for which he received five years probation on condition he serve 365 days in county jail, (3) August 1989 conviction of battery (§ 242) for which he received 24 months summary probation with 12 days in county jail, (4) September 1992 conviction of theft of personal property (§ 484, subd. (a)) for which he received 24 months summary probation and one day in jail, (5) April 1994 conviction of driving under the influence (Veh. Code, § 23152, subd. (a)) for which he received 60

months summary probation and 68 days in county jail, (6) November 1996 conviction of obtaining telephone service by fraud (§ 502.7, subd. (a)(5)) for which he received four years in state prison, (7) January 2005 conviction of battery of former spouse for which he received 36 months summary probation and 180 days in county jail, and (8) March 2005 conviction of assault with a deadly weapon (§ 245, subd. (a)(1)) for which he received three years state prison.

In this matter, appellant was convicted of second degree murder, with a trial court finding that he had suffered a prior felony strike and prior prison term. The trial court sentenced him to an aggregate sentence of 32 years to life calculated as follows: 15 years to life for the murder, doubled to 30 years to life as a second strike, plus one year for the deadly weapon use enhancement (§ 12022, subd. (b)(1)) and one year for the prior prison term enhancement (§ 667.5, subd. (b)).

At the sentencing hearing, appellant spoke on his own behalf and stated: “To my sister Anna and Carlos, I’m very sorry for that incident that happened that day. I know it was a tragic day for them, too, and especially the rest of my family. I wish I could remember what happened that day, but I can’t. I know I’m supposed to protect my brothers and I’m the one that hurt him and I’m wrong for that. I just want them to know that I’m always going to love him no matter what, and I accept the punishment that is going to be given to me today, your Honor. And I just want to apologize to them for this tragic event.”

Appellant filed a *Romero* motion, seeking to dismiss his 1989 prior strike for kidnapping. While acknowledging that the present offense was serious, he argued that the prior strike was remote in time, he was only 20 years old at the time of that offense, it was comparatively minor resulting from an argument with his girlfriend for which he was only sentenced to probation, he was a 40-year-old diabetic who would not survive in jail, and he was remorseful for his actions. The prosecutor objected to dismissing the strike.

The trial court denied the *Romero* motion. In doing so, it acknowledged that it had discretion to dismiss a prior strike. It considered the circumstances of the current offense, the nature and circumstances of the prior offense and appellant’s background, character

and prospects. While the trial court acknowledged that the prior felony strike was old, it also observed that appellant had sustained numerous misdemeanor and felony violations since then, including a domestic violence conviction in 2005. The court stated:

“Although the strike prior within the realm of kidnapping may have been less aggravated, the nature and circumstances of his current conviction, the murder, is substantial and weighty.” The trial court also found that the defendant was “a repeat offender of crimes of violence.”

B. Contention

Appellant contends that the trial court abused its discretion in denying his *Romero* motion. He argues that the trial court failed to consider his poor health and addictions as well as his extreme remorse.

C. Standard of Review

We review the trial court’s *Romero* ruling for abuse of discretion. (*People v. Williams* (1998) 17 Cal.4th 148, 158; *Romero, supra*, 13 Cal.4th at p. 504.) Where the record indicates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the three strikes law, we will affirm the trial court’s ruling, even if we might have ruled differently in the first instance. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) “[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.”” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977–978 (*Alvarez*)). The trial court “is presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary.” (*People v. Myers, supra*, at p. 310.)

D. Applicable principles

Section 1385 provides in part: “The 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.” (§ 1385, subd. (a).) *Romero* held that trial courts have authority to strike a prior conviction pursuant to section 1385. (*Romero, supra*, 13 Cal.4th at pp. 529–530.) In deciding whether to do so, the trial court must take into

account the defendant's background, the nature of his current offense and other individualized considerations. (*Id.* at p. 531.) Determining what constitutes "in furtherance of justice" entails consideration "both of the constitutional rights of the defendant, and *the interests of society represented by the People, . . .*" . . . At the very least, the reason for dismissal must be "that which would motivate a reasonable judge." (*Id.* at pp. 530–531.) Thus, in deciding whether to strike a prior conviction, "the 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." (*People v. Williams, supra*, 17 Cal.4th at p. 161.)

"The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. . . . In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." (*Alvarez, supra*, 14 Cal.4th at pp. 977–978.) We presume, in the absence of evidence to the contrary, that the trial court considered all relevant criteria (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 836) and knew and applied the correct statutory and case law (*People v. Jacobo* (1991) 230 Cal.App.3d 1416, 1430).

Striking a serious felony is an extraordinary exercise of discretion and is reserved for extraordinary circumstances (see *People v. Philpot* (2004) 122 Cal.App.4th 893, 905), such as where the trial court is not aware of its discretion or considers impermissible factors. (*Ibid.*) It only occurs when reasonable minds could not differ that the criminal falls outside the spirit of the three strikes scheme. (*People v. Carmony* (2004) 33 Cal.4th 367, 378.)

E. The trial court did not abuse its discretion

We conclude that the trial court did not abuse its discretion in denying appellant's request to dismiss his prior felony strike. First, we observe that the trial court was fully

aware of its discretion to dismiss the prior strike and thoroughly articulated the appropriate legal analysis required in making the determination of whether to do so. Thus, this is not one of those extraordinary cases in which the *Romero* ruling must be reversed because the record reflects that the trial court was unaware of its discretion to dismiss a prior felony strike. (*People v. Philpot, supra*, 122 Cal.App.4th at p. 905.)

The trial court appropriately considered the seriousness of the charged offense, indicating that it was at the top of the list of serious offenses. While it acknowledged that the prior felony strike might not have been the most serious of offenses, it noted that the record before the court did not fully indicate the underlying facts of that matter. Simply because the prior strike was remote in time did not mandate its dismissal. No case law compels a judge to strike a prior conviction because it is old. (See *People v. Gaston* (1999) 74 Cal.App.4th 310, 320 [reversed trial court order striking a 1981 prior conviction as an abuse of discretion because of the defendant's "unrelenting record of recidivism," characterizing him as "the kind of revolving-door career criminal for whom the Three Strikes law was devised"].)

While appellant's criminal record is not the worst that unfortunately has come before us, there were regularly committed crimes over the years, several of which involved violence, including 2005 convictions of battery of a former spouse and assault with a deadly weapon. We agree with the trial court that this is not the type of record that removes appellant from the spirit of the three-strikes law.

Appellant argues that the trial court failed to consider appellant's poor health, addictions and his extreme remorse. Simply because the trial court did not specifically refer to those factors in explaining its decision does not mean that it did not consider them. The trial court "is presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary." (*People v. Myers, supra*, 69 Cal.App.4th at p. 310.) These factors had been brought to the trial court's attention in the briefing and oral argument. Further, the trial court was well justified in giving no credence to appellant's new-found remorse expressed minutes before he knew he was

going to be sentenced, when that remorse was nowhere to be seen when appellant failed to aid his dying brother, or reflect even the slightest concern for what he had done.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ