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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

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THE PEOPLE,

Plaintiff and Respondent,

v.

JUSTIN PAGE,

Defendant and Appellant.

C067163

(Super. Ct.  
No. 10CR17045)

Defendant Justin Page appeals the judgment of conviction entered against him after a jury found him guilty of being a felon in possession of a firearm. He contends (1) the trial court violated his constitutional rights to due process and trial by jury by removing an element of the crime from the jury's determination, (2) the trial court failed to instruct the jury on reasonable doubt, (3) the trial court abused its discretion in failing to dismiss his prior strike conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), and (4) there is insufficient evidence of his ability to pay the booking fee imposed by the trial court. As

will be explained, each of defendant's claims lacks merit. We therefore affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

Defendant picked up his friend, Dylan Woody, from Woody's grandfather's house in Tahoe City on his way to visit family at a home just outside of Ione. Woody got into the car carrying a rifle wrapped in a pink towel. He unwrapped the towel and showed defendant the rifle. They discussed that they would shoot the rifle in Ione, where it was "pretty wide open." Woody wrapped the rifle back up and laid it down on the folded-down back seat, and they started on their way.

On the way to Ione, defendant stopped at a convenience store. Both men rummaged around in the back of the car to make room for the groceries and then went into the store. When they returned to the car, they realized they had inadvertently uncovered the rifle. They covered it back up before getting back into the car and continuing on their way.

At some point during the trip, defendant was pulled over by Ione Police Officer Joshua Long for speeding. Defendant informed Officer Long he was on parole. Officer Long noticed the smell of marijuana and asked if there was anything illegal in the car. Defendant said there was marijuana "in the back." After confirming that neither occupant had any outstanding warrants, Officer Long asked defendant to step out of the car, checked him for weapons and contraband, handcuffed him, and placed him in the rear of the patrol car. He also checked Woody for weapons and contraband and asked him if there was anything

illegal in the car. Woody told him about the marijuana and the rifle. Officer Long searched the car and found the rifle, which was within arm's reach of both occupants. Woody said the rifle was his and that he had recently inherited it from his grandfather. Officer Long confiscated the rifle and, after confirming it was not loaded,<sup>1</sup> issued Woody a written property receipt. Officer Long also found two baggies of marijuana in the pocket of a sweatshirt. Defendant told Long he had "a medical marijuana card" and gave him a small piece of paper with some information on it. Officer Long placed defendant under arrest for possessing a firearm and marijuana.

Defendant was charged by information with possession of a firearm by a felon, a felony (Pen. Code, former § 12021, subd. (a)(1)<sup>2</sup>) and possession of marijuana while driving, a misdemeanor (Veh. Code, § 23222, subd. (b)). The information alleged one prior conviction (§ 667.5, subd. (b)) and a prior serious or violent felony conviction (§ 667, subs. (b) - (i)).

A jury found defendant guilty of being a felon in possession of a firearm, but was unable to reach a verdict on the marijuana possession charge. The trial court declared a mistrial on that charge, which was thereafter dismissed on the People's motion. In a bifurcated proceeding, the court found

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<sup>1</sup> Woody testified at trial that there was no ammunition in the car.

<sup>2</sup> Undesignated statutory references are to the Penal Code.

the prior conviction and prior strike conviction allegations true.

Defendant filed a *Romero* motion asking the court to strike his prior strike, a 2003 conviction for threatening to commit a crime resulting in death or great bodily injury (§ 422). After oral argument on the matter, the court denied defendant's motion. The court sentenced defendant to the middle term of two years, doubled pursuant to the prior strike, plus one year for the prior prison term, for an aggregate term of five years in state prison. Defendant was awarded 282 days of presentence custody credit and ordered to pay specified fees and fines, including a \$63.50 booking fee.

Defendant filed a timely notice of appeal.

#### DISCUSSION

##### I

##### *Elements of Crime*

Defendant was convicted of being a felon in possession of a firearm in violation of former section 12021, subdivision (a)(1), which provided that a convicted felon who "owns, purchases, receives, or has in his or her possession or under his or her custody or control any firearm is guilty of a felony." The elements of the offense are "conviction of a felony and ownership or possession of a firearm." (*People v. DePrima* (1959) 172 Cal.App.2d 109, 114.)

A "firearm" is defined as "any device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of any explosion or other form of

combustion.” (§ 16520 (formerly § 12001, subd. (b)); *People v. Arnold* (2006) 145 Cal.App.4th 1408, 1414.)

Here, the trial court explained the elements required to prove the charge against defendant, telling prospective jurors, “The next element is the prosecution will be required to prove that the defendant knowingly possessed a firearm. I don’t think there’s going to be much objection as to the fact that the object in this case was, in fact, a firearm. So the real issue you’ll have to decide is did the defendant knowingly possess a firearm.” In doing so, defendant claims, the court “instructed the jury on the firearm possession offense.” His claim, however, fails to acknowledge that the court’s statement was made during voir dire, before a jury was impaneled and prior to jury instructions being given.

In any event, any potential error was harmless beyond a reasonable doubt because the jury was properly instructed and defendant conceded the issue. (*Chapman v. California* (1967) 386 U.S. 18 (*Chapman*) [17 L.Ed.2d 705]; *People v. Flood* (1998) 18 Cal.4th 470, 503-505.)

First, once the jury was impaneled and the evidence phase of trial completed, the court instructed the jury with CALCRIM No. 2511 as follows: “The defendant is charged in Count 1 with unlawfully possessing a firearm in violation of . . . Section 12021(a)(1). [¶] To prove that the defendant is guilty of this crime, the People must prove that: 1. The defendant possessed a firearm; 2. The defendant knew that he possessed the firearm; AND [¶] 3. The defendant had previously been convicted of a

felony. [¶] A firearm is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of an explosion or other form of combustion. [¶] A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting."

Defendant claims the instruction did not cure the court's previous error because it does not specifically instruct the jury to determine whether the object was in fact a firearm. We disagree. The version of CALCRIM No. 2511 given to the jury details each element of the offense of possessing a firearm and specifically defines what constitutes a "firearm." The requirement that the jury resolve that the rifle was indeed a firearm is implicit in that instruction.

Next, the record demonstrates that defendant conceded the issue. During closing argument, the prosecutor highlighted CALCRIM No. 2511 and the elements required to prove the charge of possession of a firearm, stating, "The three elements are: the defendant possessed a firearm, the defendant knew that he possessed the firearm, and the defendant had previously been convicted of a felony." The prosecutor added, "Well, the first one's been stipulated to. We don't have to argue about that. Okay? That's done." There was no objection from defendant. The lack of an objection is consistent with the fact that, on no less than 12 occasions during closing argument, defense counsel

referred to the rifle as "the firearm" or "that firearm,"<sup>3</sup> suggesting that the issue of whether the rifle was a "firearm" was uncontroverted.

In sum, any error resulting from the trial court's statement during voir dire was harmless.

## II

### *Reasonable Doubt Instruction*

Defendant claims the trial court committed reversible error when it failed to instruct the jury, at the end of trial, with a reasonable doubt instruction (CALCRIM No. 220). We disagree.

The trial court "must . . . instruct *sua sponte* on those general principles of law which are closely and openly connected with the facts and are necessary for the jury's understanding of the case. [Citation.]" (*People v. Vann* (1974) 12 Cal.3d 220, 226 (*Vann*)). This includes giving an instruction that the defendant is presumed to be innocent and the prosecution has the burden of proving the defendant's guilt beyond a reasonable doubt. Failure to do so is reversible error. (*Id.* at pp. 225-226.)

However, "in a case where the jurors have been told the prosecution must prove its case beyond a reasonable doubt and there has not been an erroneous definition of that burden of

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<sup>3</sup> For example, defense counsel concluded his closing argument with the following statement: "The facts are what they are. On July 11th, 2010, my client knew there was a *rifle* in that truck. On July 11th, 2010, my client did not knowingly possess *that firearm*. Simply knowing it's there is not a crime. He's not guilty. Thank you." (Italics added.)

proof, the harmless-error standard applied by our Supreme Court in *Vann, supra*, 12 Cal.3d 220 [i.e., the standard of reversible error set forth in *Chapman, supra*, at p. 24 remains the controlling law]." (*People v. Flores* (2007) 147 Cal.App.4th 199, 211.)

"Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.] "In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given."

[Citation.]' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

Here, at the start of trial, the trial court instructed the jury on reasonable doubt by reading verbatim the text of CALCIM No. 103 as follows: "I will now explain the presumption of innocence and the People's burden of proof. The defendant has pleaded not guilty to the charges. The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the

People prove the defendant guilty beyond a reasonable doubt. Whenever I tell you that the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt, because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all of the evidence that was received throughout the entire trial. [¶] Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

The court noted that, "Whether I instruct you before, during, or after the taking of testimony, all of the instructions are to be considered in light of all the others and they are all of equal importance. The order in which I give instructions or the timing of when I give instructions are not relevant in this case."

The jury was given written instructions, including CALCRIM No. 103, to refer to during deliberations.

Defendant claims the trial court erred by failing to instruct the jury with CALCRIM No. 220 on reasonable doubt *at the end of trial*, and argues that instructing the jury with CALCRIM No. 103 on reasonable doubt *pretrial* was insufficient to correct that error under *Vann, supra*, 12 Cal.3d 220 at pages 226-227. We are not persuaded.

In *Vann*, notwithstanding an explanation of reasonable doubt given to the panel of prospective jurors prior to jury selection and the fact that other instructions referencing reasonable doubt "in isolated applications" were given to the jury prior to deliberation, the trial court inadvertently failed to include in its oral and written instructions to the impaneled jury any specific instruction that the defendants were presumed innocent and that the prosecution had the burden of proving their guilt beyond a reasonable doubt. (*Vann, supra*, 12 Cal.3d at pp. 225, 227.) The Supreme Court found that none of the instructions given was sufficient to apprise the jury of the constitutional requirement that each element of the offense be proved beyond a reasonable doubt, and held the omission was not harmless beyond a reasonable doubt and therefore prejudicial. (*Id.* at p. 228.)

Here, unlike *Vann*, the jury, once impaneled, was verbally instructed with a specific instruction on defendant's presumed innocence and the prosecution's burden of proving his guilt beyond a reasonable doubt. The identical written instruction was then provided to the jury predeliberation. The absence of instructions advising the jury of the People's burden of proving each element of the charged offense beyond a reasonable doubt in *Vann, supra*, 12 Cal.3d 220 is not present here. The jury was given a constitutionally adequate reasonable doubt instruction. (*People v. Mayo* (2006) 140 Cal.App.4th, 535, 548-549 (*Mayo*) [omission of standard reasonable doubt instruction -- CALJIC No. 2.90 or CALCRIM No. 220 -- does not constitute federal constitutional error where specific facts show other

instructions adequately informing jury of correct standard of proof].)

Defendant also contends *Mayo* was wrongly decided and urges us to reconsider the holding in *Vann* that absence of a reasonable doubt instruction is reviewable under the *Chapman, supra*, 386 U.S. 18 standard of reversible error. Given our determination that the jury was adequately instructed on reasonable doubt, we need not reach these issues.

After reviewing all of the instructions given by the trial court, we conclude that the jury was fully and fairly instructed on defendant's presumption of innocence and the prosecution's burden of proving defendant's guilt beyond a reasonable doubt.

### III

#### *Prior Strike Conviction*

Defendant contends the trial court abused its discretion in denying his motion to strike the prior strike conviction. He claims the nonviolent nature of all but one of his prior convictions (the prior strike), the nonviolent nature of the current offense, and the fact that he did not own nor did he ever touch the rifle all place him outside the spirit of the three strikes law. Again, we disagree.

Section 1385 gives the trial court authority, on its own motion or upon application of the prosecution, "and in furtherance of justice," to order an action dismissed. (§ 1385, subd. (a).) In *Romero, supra*, 13 Cal.4th 497, the California Supreme Court held a trial court may utilize section 1385 to strike or vacate a prior strike for purposes of sentencing under

the three strikes law, "subject, however, to strict compliance with the provisions of section 1385 and to review for abuse of discretion." (*Romero, supra*, 13 Cal.4th at p. 504.) Likewise, a trial court's "failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*).)

In ruling on a *Romero* motion, the trial 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 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 (*Williams*).)

Dismissal of a strike is a departure from the sentencing norm. Therefore, in reviewing a *Romero* decision, we will not reverse for abuse of discretion unless the defendant shows the decision was "so irrational or arbitrary that no reasonable person could agree with it." (*Carmony, supra*, 33 Cal.4th at p. 377.) Reversal is justified where the trial court was unaware of its discretion to strike a prior strike or refused to do so at least in part for impermissible reasons. (*Id.* at p. 378.) But where the trial court, aware of its discretion, "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' [citation]." (*Ibid.*)

In support of his claim that the trial court abused its discretion, defendant argues that, but for his prior strike conviction for making threats to commit a crime resulting in death or great bodily injury (§ 422), none of his prior crimes "reflected any acts of violence or weapons use." He notes the absence of any allegations in the record that he ever physically harmed anyone, pointing out that most of his criminal record consists of parole violations resulting from administrative infringements. He argues further that the current offense is a "wobbler" that did not involve the threat of violence, and that he neither owned nor touched the rifle, making his role in the offense "passive."

Each of these arguments was made to the trial court by defense counsel. In denying defendant's motion, the court explained: "Now, on the motion under [section] 1385 of the Penal Code for the Court to strike the allegation of the prior strike in the interest of justice, that's a much closer issue. You know, if this were a case where the defendant had two strikes on his record right now and he's facing this very same charge, I would be very hesitant sending a gentleman like [defendant] to state prison for a 25-years-to-life term for this conduct, and the Court would no doubt exercise its discretion and strike one of the strikes, leaving him a one striker. This is not a case where he has two strikes; this is a case where he has one. [¶] It's a lot different because he's looking at -- if

the Court were to strike the strike, the indicated sentence from this Court now, the tentative ruling, is he would be sentenced to four years in state prison. And if I don't strike the strike, he will be serving more time. We are talking one year in prison, in essence rather than a 25-to-life versus a seven-year term or something. [¶] The defendant's involvement in this offense was probably less serious than similar felony charges appearing before the Court as purported by defense counsel. There was no ammunition involved in this case. The defendant was generally cooperative with the investigating officers. He had a few things going for him. [¶] What he doesn't have going for him is his past record that's been summarized by [the prosecution], as well as outlined and detailed by the probation department. The defendant has a strike out of Placer County in 2003. He was given 120 days in jail, three years probation. There was a probation violation. It was revoked and reinstated with 30 days in jail. And, then, the next year it was revoked and reinstated again for 90 days in jail. After that, it was revoked and the defendant was sentenced to state prison. And there were ultimately three probation violations while in state prison. I assume the third probation violation was, in fact, the present case. [¶] Is that a reasonable deduction? [¶] . . . [¶] The defendant, nevertheless, was convicted of an escape. He was given probation. He violated that. It was revoked. He was sentenced to state prison for which he had the multiple parole violations, including the present offense. In the County of Nevada the defendant suffered a reckless driving. It looks like

a plea bargain down from a DUI in 2005. He can't even comply with the probation there. He's given 12 days in jail. And, then, two years later it was revoked, and he gets 150 days in jail. In other words, he was maxed out with the original -- well, 12 days and 150. About 18 days less than the maximum sentence he could receive for that offense for having violated probation. [¶] And, then, in the State of Nevada he serves time in custody on a paraphernalia fix. And, then, we have more violations in the County of Nevada, State of California. The defendant has just shown excessive criminality. He just can't seem to get his act together. He is becoming a recidivist criminal, and this is what the whole idea behind the three strikes law is. We're losing tolerance with the revolving door with these defendants coming in and out, and longer terms are in order. [¶] I mean, I see a reasonable argument has been made by the defense. As I said, this is a case where I think the Court has the discretion to go either way, and either decision I make for or against striking the strike, I don't think would be deemed an abuse of the Court's discretion. I'm the first to admit this is a close case. I've been thinking about it a lot since I read the file at noon today, when I consider on balance all of the factors. Though the Court is given discretion, I'm going to deny the motion to strike the strike."

The three strikes law establishes sentencing norms and "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.) This presumption will only be

rebutted in an "extraordinary case -- where the relevant factors described in *Williams, supra*, 17 Cal.4th 148, manifestly support the striking of a prior conviction and no reasonable minds could differ . . . ." (*Carmony, supra*, 33 Cal.4th at p. 378.)

However, "[w]here the record is silent [citation], or '[w]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, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance' [citation]." (*Ibid.*)

The record here demonstrates the trial court clearly understood its discretion, which it exercised with great care, mindful of the full impact of its decision. While defendant makes much of the fact that the trial court "acknowledged the closeness of this issue," that fact further demonstrates the court's careful consideration of the facts against the backdrop of the purpose and spirit of the three strikes law.

The trial court concluded this is not such an extraordinary case as to warrant dismissal of the strike. On this record, we cannot say the court's conclusion is "so irrational or arbitrary that no reasonable person could agree with it." (*Carmony, supra*, 33 Cal.4th at p. 377.) We therefore find no abuse of discretion.

#### IV

##### *Booking Fee*

The trial court imposed a \$63.50 booking fee. Defendant claims there is no evidence of his ability to pay the fee as

required by Government Code section 29550, subdivisions (d)(1) and (d)(2), and thus the fee must be stricken.

The Attorney General argues defendant has forfeited his claim by failing to object in the trial court.

Defendant responds that he is challenging the sufficiency of the evidence and, that such a challenge is not forfeited by his failure to object in the trial court.

The right to appellate review of a nonjurisdictional sentencing issue not raised in the trial court is forfeited. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 751-755; *People v. Scott* (1994) 9 Cal.4th 331, 356.) This court has previously held that if a defendant does not object in the trial court to the imposition of a fee or fine, the issue is forfeited. (*People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [crime prevention fine -- § 1202.5, subd. (a)]; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [jail booking fee -- Gov. Code, § 29550.2]; see also *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1069-1072.) We have applied the forfeiture rule, even when the claim on appeal is that there is not sufficient evidence to support the imposition of the fine or fee. (*People v. Gibson* (1994) 27 Cal.App.4th 1466, 1467, 1468-1469 (*Gibson*) [restitution fine -- Gov. Code, former § 13967, subd. (a)].) This is so because defendant's plea of not guilty does not put the prosecution on notice that it will be required to present evidence of defendant's ability to pay. (*Gibson, supra*, at pp. 1468-1469.)

Defendant contends his claim finds support in *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*). There, the Sixth Appellate District struck a booking fee on the ground of insufficient evidence of ability to pay. (*Id.* at pp. 1399-1400.) Relying on its own precedents, the court concluded the issue had not been forfeited. (See *People v. Viray* (2005) 134 Cal.App.4th 1186, 1217; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1536-1537.) This holding created a conflict between *Pacheco* and the cases we cite in the text above. The California Supreme Court has agreed to resolve the conflict. (See *People v. McCullough* (2011) 193 Cal.App.4th 864, review granted on June 29, 2011, S192513.) Until the California Supreme Court issues further guidance, we continue to adhere to our holding in *Gibson*; i.e., that a failure to object to a fee or fine in the trial court forfeits the issue, even where the statute contemplates a judicial finding of ability to pay and the defendant challenges the sufficiency of the evidence to support such a finding. (*Gibson, supra*, 27 Cal.App.4th at pp. 1467, 1468-1469.) "As a matter of fairness to the trial court, a defendant should not be permitted to assert for the first time on appeal a procedural defect in imposition of a restitution fine, i.e., the trial court's alleged failure to consider defendant's ability to pay the fine. [Citation.] Rather, a defendant must make a timely objection in the trial court in order to give that court an opportunity to correct the error; failure to object should preclude reversal of the order on appeal." (*Gibson*, at p. 1468.)

DISPOSITION

The judgment is affirmed.

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HOCH, J.

We concur:

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BLEASE, Acting P. J.

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BUTZ, J.