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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

RUSSELL ZEKE ARMITAGE,

Defendant and Appellant.

C069103

(Super. Ct. No.  
11F00244)

A jury convicted defendant Russell Zeke Armitage on multiple counts of oral copulation, sexual intercourse and sodomy with a child 10 years old or younger, and found that he served five prior prison terms. The trial court sentenced defendant to two terms of 15 years to life in prison, four terms of 25 years to life in prison, and one additional year in prison for each of the five prior prison term enhancements.

Defendant now contends (1) the trial court violated his rights to due process and a fair trial when it allowed the

prosecutor to tell the jury during voir dire that "[t]his is not a three strikes case"; and (2) there is insufficient evidence to support one of the prior prison term enhancements.

We conclude (1) the trial court did not deny defendant due process or a fair trial, because the prosecutor's statement was accurate and served to clarify the circumstances of the case; and (2) we agree with defendant and the Attorney General that one of the prior prison term enhancements must be stricken, because defendant did not serve five prior *separate* prison terms.

We will modify the judgment to strike one of the five prior prison term enhancements and affirm the judgment as modified.

#### BACKGROUND

We limit our background discussion to the facts relevant to the issues on appeal.

Prior to trial, defendant withdrew his motion to bifurcate trial on the prior prison term enhancements; he believed the jury would hear such evidence anyway because he intended to testify.

The next day, the prosecutor expressed concern that because the jury would now be considering the prior prison terms, they might assume the case involved the three strikes law. The prosecutor wanted to negate any biases the jurors might harbor regarding the three strikes law. Accordingly, the prosecutor asked that the prospective jurors be told during voir dire that this is not a three strikes case.

Defense counsel opposed making such a statement to the jury, asserting it was not appropriate for the jury to consider penalty or punishment. Defense counsel asserted that if the People wanted to inform potential jurors that this is not a three strikes case, the only reason for that was to make the jurors "less concerned about the effect" of the case on defendant.

After further argument, the trial court agreed that the prosecutor could inform the prospective jurors during voir dire that this is not a three strikes case, but the prospective jurors would also need to be informed that they must not consider penalty or punishment and cannot consider the priors except as instructed by the trial court.

During voir dire, the prosecutor made the following statement:

"Penalty or punishment: Not something jurors consider. It is fully the purview of the Court if and when someone is convicted. The jurors focus purely on the question of guilt. [¶] So, an example: Three strikes. Controversial issue. This is not a three strikes case. But an example would be that discussion happening in the deliberation room, would be totally inappropriate. Anything surrounding penalty or punishment would be inappropriate to discuss, inappropriate to consider."

The jury convicted defendant on two counts of oral copulation with a child ten years of age or under (Pen. Code,

§ 288.7, subd. (b); counts one and two),<sup>1</sup> two counts of sexual intercourse with a child ten years of age or under (§ 288.7, subd. (a); counts three and four), and two counts of sodomy with a child ten years of age or under (§ 288.7, subd. (a); counts five and six). In addition, the jury found true the allegations that defendant served five prior prison terms. (§ 667.5, subd. (b).) The trial court sentenced defendant to the following consecutive terms: two terms of 15 years to life on the convictions for oral copulation, four terms of 25 years to life on the convictions for sexual intercourse and sodomy, and one year for each of the prior prison term enhancements.

#### DISCUSSION

##### I

Defendant contends the trial court violated his rights to due process and a fair trial when it allowed the prosecutor to tell the jury during voir dire that “[t]his is not a three strikes case.”

The People claim defendant forfeited this contention on appeal because defense counsel did not specifically inform the trial court that she was objecting on constitutional grounds. But an objection is sufficient if it fairly apprises the trial court of the issue the trial court is called upon to decide. (*People v. Scott* (1978) 21 Cal.3d 284, 290; see also *People v. Clark* (2011) 52 Cal.4th 856, 889, fn. 7; *People v. Miranda*

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

(2011) 199 Cal.App.4th 1403, 1422, fn. 15.) The extended argument and discussion in the record on this issue indicates that the trial court understood the issue it was asked to address. Defendant did not forfeit the issue on appeal.

Turning to the merits of defendant's contention, the trial court did not deny defendant due process or a fair trial when it allowed the prosecutor to tell the jury during voir dire that this is not a three strikes case. The statement was accurate and served to clarify the circumstances of the case.

Such a statement during jury selection did not violate the constitution. "[W]hile the right to an impartial jury enjoys constitutional protection, the manner of choosing that jury is not similarly endowed." (*People v. Cardenas* (1997) 53 Cal.App.4th 240, 246.) A trial court has great latitude in determining the scope of voir dire (*People v. Rogers* (2009) 46 Cal.4th 1136, 1149-1150), and a trial court's exercise of discretion during voir dire is accorded considerable deference by appellate courts. (*People v. Cardenas, supra*, 53 Cal.App.4th at p. 247.)

In any event, the trial court ensured that the prosecutor's comment was made in the context of emphasizing that the jurors were not to consider defendant's possible penalty or punishment. Absent evidence to the contrary, general statements made during voir dire do not create "such an indelible impression on prospective jurors" that they are unable to follow specific jury instructions given before deliberations. (*People v. Holt* (1997) 15 Cal.4th 619, 662.) Here, the trial court instructed the

jurors with CALCRIM No. 3550, which states in relevant part: "You must reach your verdict without any consideration of punishment." We assume the jurors understood and followed the trial court's instructions. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.)

## II

The trial court sentenced defendant to one year in prison for each of his five prior convictions pursuant to section 667.5, subdivision (b). But defendant contends one of the enhancements must be stricken because there is insufficient evidence that he served five prior separate prison terms. The Attorney General agrees, and we do, too.

Section 667.5, subdivision (b) provides that the trial court "shall impose a one-year term for each prior *separate* prison term . . . ." (§ 667.5, subd. (b); italics added.) Each prior prison term must have been served separately. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.)

In this case, although defendant had five prior convictions, he did not serve five prior separate prison terms. Instead, he served a single prison term for two of his prior convictions in case Nos. 87913 and 94613. We will strike one of his prior prison term enhancements.

## DISPOSITION

The judgment is modified to strike one of the five prior prison term enhancements. As modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect this modification and to forward a certified

copy of the amended abstract of judgment to the California Department of Corrections and Rehabilitation.

\_\_\_\_\_ MAURO \_\_\_\_\_, J.

We concur:

\_\_\_\_\_ RAYE \_\_\_\_\_, P. J.

\_\_\_\_\_ HOCH \_\_\_\_\_, J.