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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.

MALCOLM PETTAWAY,

Defendant and Appellant.

C069435

(Super. Ct. No. 10F06039)

Defendant Malcolm Pettaway broke into a garage and stole a pair of binoculars and a battery charger. He was convicted by jury of first degree burglary. Following a bifurcated proceeding, the jury also found defendant had previously been convicted of three strike offenses within the meaning of the three-strikes law. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12.)<sup>1</sup> Following an unsuccessful motion to strike two of these prior convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), the trial court sentenced defendant to state prison for a term of 25 years to life.

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

On appeal, defendant contends: (1) the trial court prejudicially erred by providing the jury, during their deliberations in the first phase of the trial, with evidence of his prior rape and sodomy convictions; and (2) the trial court abused its discretion by declining to strike two of his prior strike convictions under *Romero*. The Attorney General concedes the first claim of error, but argues defendant suffered no prejudice. With respect to the second claim of error, the Attorney General argues the trial court did not abuse its discretion in finding defendant did not fall outside the spirit of the three-strikes law. First, we conclude it was error to provide the jury with evidence of defendant's prior rape and sodomy convictions, but this error was harmless given the overwhelming evidence of defendant's guilt. Second, we conclude the trial court did not abuse its discretion when it declined to strike two of defendant's prior strike convictions. The judgment is affirmed.

#### FACTS

On September 11, 2010, around 9:00 p.m., defendant broke into Richard Holmes's garage and stole a pair of binoculars and a battery charger. Holmes lived with his girlfriend on Whitney Avenue in the community of Arden-Arcade, east of Sacramento. Neither resident was home at the time of the burglary. Holmes's neighbor, Christopher Vanich, was standing in his driveway across the street when defendant made his entry. As Vanich explained, defendant rode up to the garage on a bicycle, put the bicycle behind some bushes next to the garage, and went into Holmes's backyard through a side gate. Vanich then saw what appeared to be the beam from a flashlight moving around inside the garage, which was visible because Holmes left the garage door open about six inches at the bottom to provide access for his cat. Knowing that no one was home at his neighbor's house, Vanich called 911 and reported a suspected burglary in progress.

Within two to three minutes, a Sacramento Police Department helicopter was hovering above Holmes's house. Vanich, who was still in his driveway, could also hear police sirens approaching the house. As the helicopter's spotlight fell upon Holmes's

house, Vanich was asked over the loudspeaker whether that was the correct house. A few minutes later, Vanich saw defendant emerge from the same side gate holding something in his hands. With the spotlight shining on him, defendant got onto his bicycle, stopped underneath a tree for 20 to 30 seconds, and then rode northbound on West Country Club Lane.

Vanich lost sight of defendant at that point. The helicopter did not. When defendant stopped underneath a tree at the corner of West Country Club Lane and Potter Lane, the helicopter informed the responding patrol cars of his position. Within a matter of seconds, sheriff's deputies arrived and took defendant into custody.<sup>2</sup> Defendant's bicycle was underneath the tree. A pair of surgical gloves and a pry tool were found about 10 feet from the tree. A piece of rubber that appeared to match the gloves was on one of defendant's fingertips. As defendant was being placed in a patrol car, he stated: "I screwed up. I broke into that garage. I did it. I screwed up."

A short time later, Vanich was brought to the arrest site and identified defendant as the person he saw breaking into Holmes's garage. One of the deputies then searched the path defendant took from the garage to the place of arrest. The binoculars stolen from the garage were found on West Country Club Lane. The battery charger was found in a neighbor's backyard near the arrest site.

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<sup>2</sup> Because defendant did not comply with several commands to raise his hands, and instead reached for his waistband, one of deputies used a taser to subdue defendant prior to taking him into custody. In addition to burglary, defendant was charged with resisting an officer. The jury found defendant not guilty of this crime.

## DISCUSSION

### I

#### *The Jury's Receipt of Inadmissible Evidence*

Defendant contends the trial court prejudicially erred by providing the jury, during their deliberations in the first phase of the trial, with evidence he was previously convicted of rape and sodomy. As mentioned, the Attorney General concedes the error, but argues defendant suffered no prejudice. We agree that it was error to provide the jury with evidence of the prior rape and sodomy convictions, but that the error was harmless based on the overwhelming evidence of defendant's guilt.

#### A.

##### *Additional Background*

Before trial, the prosecution sought to impeach defendant with his prior felony convictions should he take the stand. (See Evid. Code, § 788.) Defendant was convicted of forcible rape and forcible sodomy in 1981. He was convicted of first degree burglary and armed robbery in 1992. Defendant moved in limine to exclude this evidence as unduly prejudicial under Evidence Code section 352. (See *People v. Castro* (1985) 38 Cal.3d 301, 306.) The trial court ruled such impeachment would be allowed, but required the evidence to be sanitized to exclude reference to the specific crimes and instead refer to them as felonies of moral turpitude. Defendant did not take the stand. Accordingly, he was not impeached with these prior convictions.<sup>3</sup> Nevertheless, the trial court inadvertently admitted into evidence a certified copy of defendant's file in the 1981 case (Exhibit 9), which included minutes indicating defendant pled guilty to committing

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<sup>3</sup> Evidence of the 1992 burglary was admitted under Evidence Code section 1101, subdivision (b).

forcible rape and forcible sodomy and was sentenced to an aggregate term of 19 years in state prison.

The jury began its deliberations at about 11:35 a.m. on September 6, 2011. At 11:55 a.m., the court attendant brought the exhibits, including Exhibit 9, to the jury room. The jury broke for lunch five minutes later. Deliberations resumed at 1:20 p.m. At 1:40 p.m., the attendant realized Exhibit 9 was mistakenly sent to the jury room. The exhibit was retrieved at 1:45 p.m. As the exhibit was being removed from the jury room, the jury announced it had reached a verdict. Thus, the jury deliberated for about 50 minutes. Exhibit 9 was in the jury room for about 30 of those minutes.

Defense counsel moved for a mistrial, arguing the trial court must presume the jury looked at all of the exhibits and that Exhibit 9 unduly prejudiced their deliberations. The prosecution asked the trial court to inquire of the jurors whether or not they in fact looked at Exhibit 9. The trial court agreed, pointing out that it would be inappropriate to inquire into the jury's "deliberative process," but finding no harm in asking "whether or not they looked at [Exhibit 9]." Because Exhibit 10A (a certified copy of defendant's file in the 1992 case) and Exhibit 11A (a certified copy of defendant's incarceration history, abstracts of judgment, fingerprint cards, and photographs) were also admitted into evidence and sent to the jury room, the trial court asked each juror: "Exhibits 10A and 11A discussed the Defendant's 1992 burglary conviction. Did you look at any other exhibit, including Exhibit 9, that described any other prior convictions of the defendant?" Each juror responded: "No." Based on these responses, the trial court denied defense counsel's mistrial motion.

The trial court then took the jury's verdict. As mentioned, the jury found defendant guilty of first degree burglary and not guilty of resisting an officer.

## **B.**

### *Analysis*

The parties agree it was error to provide the jury with Exhibit 9 during its deliberations in the first phase of the trial. The fight on appeal is over whether this error was prejudicial. The Attorney General argues the error was harmless because the jurors never looked at Exhibit 9. Defendant asserts two purported flaws with this argument: (1) because the law presumes the jury follows instructions, and because the jury was instructed to decide the facts using “only the evidence that was presented in [the] courtroom,” including “the exhibits admitted into evidence,” we must presume the jurors considered Exhibit 9 despite their statement to the contrary; and (2) the trial court violated Evidence Code section 1150, subdivision (a),<sup>4</sup> by asking the jurors whether or not they looked at any exhibit, other than Exhibits 10A and 11A, that described any other prior convictions. While we are not persuaded by either of these purported flaws, we agree with defendant that a finding of no prejudice may not be based on the jurors’ answers to the trial court’s question. The reason is that Exhibit 11A, which the jury did not deny viewing, also contained reference to defendant’s 1981 convictions. Thus, regardless of whether the jurors looked at Exhibit 9, they nonetheless received inadmissible evidence that defendant was previously convicted of forcible rape and forcible sodomy.

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<sup>4</sup> Evidence Code section 1150, subdivision (a), provides: “Upon inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.”

Nevertheless, we find no prejudice. “When, as in this case, a jury innocently considers evidence it was inadvertently given [by the trial court], there is no misconduct. The situation is the same as any in which the court erroneously admits evidence. The fact that the evidence was inadvertently admitted and then withdrawn does not elevate the error to one of misconduct. There has been merely ‘an error of law . . . such as . . . an incorrect evidentiary ruling.’ [Citation.] Such error is reversible only if it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. [Citations.]” (*People v. Cooper* (1991) 53 Cal.3d 771, 836.) Here, the use of the word “overwhelming” when referring to evidence of defendant’s guilt is apt. Vanich witnessed the entire burglary and called 911. A police helicopter arrived within minutes and shined a spotlight on defendant as he left Holmes’s side gate and rode his bicycle away from the scene of the crime. When defendant took cover beneath a tree at the corner of West Country Club Lane and Potter Lane, the helicopter radioed his position to responding sheriff’s deputies, who arrived within seconds and took defendant into custody. Defendant’s bicycle, a pair of surgical gloves, and a pry tool were found near the tree. The property taken during the burglary was also found nearby. Vanich identified defendant as the burglar. And, as if this evidence was not overwhelming enough, as defendant was being placed in a patrol car, he confessed to committing the crime.

Finding no remote probability of a more favorable result in the absence of the error, we affirm defendant’s burglary conviction.

## II

### ***Denial of Defendant’s Motion to Strike his Prior Strike Convictions***

Defendant claims the trial court abused its discretion by declining to strike two of his prior strike convictions under *Romero*. We disagree.

Section 1385, subdivision (a), provides that a “judge or magistrate 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.” In *Romero*, our Supreme Court held that a trial court may utilize section 1385, subdivision (a), to strike or vacate a prior strike conviction 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.) Similarly, 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 reviewing for abuse of discretion, we are guided by two fundamental precepts. First, “[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] 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.” [Citations.] Second, 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.’” [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Carmony, supra*, 33 Cal.4th at pp. 376-377.)

We are also mindful that “the Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court “conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant

should be treated as though he [or she] actually fell outside the Three Strikes scheme.” [Citation.]” (*Carmony, supra*, 33 Cal.4th at p. 377.) “[T]he court in question must consider whether, in light of the nature and circumstances of his [or her] present felonies and prior serious and/or violent felony convictions, and the particulars of his [or her] 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 [or she] had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*); *Carmony, supra*, 33 Cal.4th at p. 377.)

Thus, the three strikes law “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, italics added.) This presumption will be rebutted only 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.” (*Ibid.*)

Here, the trial court considered the relevant factors. With respect to the nature and circumstances of defendant’s present felony offense, the trial court noted it “did not involve actual or threatened violence to an individual.” Nevertheless, first degree burglary is a serious felony offense. (See § 1192.7, subd. (c)(18).) With respect to the nature and circumstances of defendant’s prior strike offenses, the trial court noted they were “quite old.” As mentioned, the first two strike offenses (forcible rape and forcible sodomy) were committed in 1981. The third strike offense (armed robbery) was committed in 1992. However, as the trial court correctly observed, all three of these offenses “involved violence” (see § 667.5, subd. (c)(3), (4), (9)) and resulted in “significant period[s] of incarceration.” Moreover, the 1992 robbery was committed less than six months after defendant’s release from prison. Following his subsequent release from prison, defendant was convicted of driving under the influence in 2002 and failing

to register his change of address pursuant to the Sex Offender Registration Act in 2006. With respect to defendant's background, character, and prospects, the trial court noted: "The defendant is 59.<sup>5</sup> Hopefully his age has reduced his tendency to violence. Defendant was involved in the program and has a probation or parole officer. The defendant was working as a dishwasher close to the time. [*Sic*: of his present felony offense]. That has been his primary employment or the only employment the Court was aware of. The defendant is married with no children." The trial court ruled that defendant did not fall outside the spirit of the three-strikes law.

Defendant argues this was an abuse of discretion and relies primarily on *People v. Bishop* (1997) 56 Cal.App.4th 1245 (*Bishop*). Such reliance is misplaced. There, Bishop was convicted of petty theft with a prior theft-related conviction for shoplifting six videocassettes and was found to have three prior strike convictions. Despite several convictions between the strike offenses and the current offense, the trial court dismissed two of Bishop's strikes and sentenced him to 12 years in state prison as a one-strike offender. The trial court noted the strikes were remote in time (17 to 20 years old), the current offense was nonviolent, and the penalty of 12 years would keep Bishop in prison for a significant period of time. (*Id.* at pp. 1248-1249.) The Court of Appeal affirmed, commenting: "Bishop is not a worthy member of society. . . . While the People and perhaps even this court may be of the opinion that Bishop appears undeserving of leniency, the paramount consideration is not what the prosecution, defense or appellate court might conclude. Rather, what counts is what the trial court in this case concluded, as expressed by the reasons it stated under section 1385, subdivision (a). On this record, we cannot say that the trial court's decision to dismiss two of Bishop's strikes in furtherance of justice constituted an abuse of discretion." (*Id.* at p. 1251.)

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<sup>5</sup> Defendant was actually 52 years old.

Defendant argues his case is “essentially equivalent” to *Bishop, supra*, 56 Cal.App.4th 1245. We disagree for two reasons. First, unlike Bishop, defendant in this case was convicted of first degree burglary, a serious felony offense. (See § 1192.7, subd. (c)(18).) As our Supreme Court has explained, “the distinction between first and second degree burglary is founded upon the perceived danger of violence and personal injury that is involved when a residence is invaded.” (*People v. Cruz* (1996) 13 Cal.4th 764, 775-776.) While defendant characterizes the crime as “a relatively minor burglary, involving entry only of the garage, and the theft of two relatively minor items,” had Holmes or his girlfriend been home and heard defendant rummaging through the garage, there might well have been a violent confrontation. The fact that such a confrontation did not occur does not make his invasion of Holmes’s residence the equivalent of the petty theft in *Bishop*. (See *People v. Thorn* (2009) 176 Cal.App.4th 255, 262 [immediately contiguous and functionally interconnected garage is part of inhabited dwelling for purposes of burglary statute].)

Second, even if we accept defendant’s remaining arguments, i.e., “his prior offenses were largely remote, and some were relatively minor,” he committed the present burglary because he “recently lost his job, and [needed] to make his rent,” and “[s]ince he was already 52 years old, and would not be released, even if two of his ‘strike[s]’ were stricken, until after age 60, [this] would reduce the chances that he would commit any further violent crime,” we cannot conclude the trial court abused its discretion by declining to strike defendant’s prior strikes for these reasons. In *Bishop*, the Court of Appeal affirmed the trial court’s decision to strike two of the prior strikes despite finding that Bishop was “not a worthy member of society” and was perhaps “undeserving of leniency.” (*Bishop, supra*, 56 Cal.App.4th at p. 1251.) But it would be another matter entirely to conclude, as defendant asks us to do, that the trial court *abused its discretion* by declining to strike two of his prior strikes on these facts. After considering the

relevant factors, the trial court decided defendant did not fall outside the spirit of the three-strikes law and declined to strike two of defendant's prior strike convictions under *Romero, supra*, 13 Cal.4th 497. This was not an abuse of discretion.

DISPOSITION

The judgment is affirmed.

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

We concur:

\_\_\_\_\_ NICHOLSON \_\_\_\_\_, Acting P. J.

\_\_\_\_\_ MURRAY \_\_\_\_\_, J.