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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

SERGIO ARGUETA,

Defendant and Appellant.

C071454

(Super. Ct. No. 11F316)

Defendant Sergio Argueta appeals from a judgment of conviction following a jury trial on counts of assault by means of force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(1)¹ (Count 1)) and battery with serious bodily injury (§ 243, subd. (d) (Count 2)). In a bifurcated proceeding, the trial court found true allegations that defendant had sustained two prior convictions for violent or serious felonies and had

¹ Undesignated statutory references are to the Penal Code in effect at the time of the charged offenses.

served a prior prison term (§ 667, subds. (b)-(i); § 667.5, subd. (b).) Defendant was sentenced to 25 years to life plus one year.

On appeal, defendant contends that: (1) the trial court erred in instructing the jury with CALCRIM No. 240 and failing to instruct on supervening cause, and if the claim is forfeited, trial counsel provided ineffective assistance of counsel by failing to request an instruction on supervening cause; and (2) the court abused its discretion in denying defendant's *Romero*² motion to strike his two prior strike convictions.

We conclude that the court properly gave CALCRIM No. 240, which correctly stated the law, and defendant forfeited his claim on appeal by failing to object to or request clarification of the instruction or an addition thereto. We also conclude that defendant has not demonstrated that his trial counsel was constitutionally ineffective because he did not request clarifying or additional instruction on superseding cause. We further conclude that the court did not abuse its discretion in denying defendant's motion to strike his strike convictions.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Charged Offenses

Defendant was charged in an amended information in count one with assault by means of force likely to cause great bodily injury in violation of section 245, subdivision (a)(1),³ and in count two with battery resulting in serious bodily injury in violation of section 243, subdivision (d). Two prior convictions for violent or serious felonies and a prior prison term were alleged. (§ 667, subds. (b)-(i); § 667.5, subd. (b).)

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

³ Defendant was not charged with a separate enhancement for personally causing great bodily injury in connection with this count. (§ 12022.7, subd. (a).)

Trial Evidence

On January 15, 2011, at approximately 9:30 p.m., a fight broke out on the Win-River Casino's property in Redding, California. The casino's video surveillance department radioed to the security guards that there was a large physical altercation on Rancheria Road, which is adjacent to the casino. Several security guards responded to the scene, including the victim, Cody Rollins, and his colleagues, Aaron Anderson, Laura Kennedy, Benjamin Fehr, and security supervisor Randalf Roberts. When Roberts arrived at the scene, bystanders informed him that "there [were] five guys beating up one guy." The guards observed a group of men attacking one person. Surveillance footage shows that defendant was involved in the fight. Anderson approached the group, yelling "security," "stop," "break it up," and the group began to scatter. Roberts then saw one man fleeing from the group and what appeared to be another security guard chasing him. Roberts caught the man in a "bear-hug type hold," falling to the ground, and Rollins assisted Roberts in attempting to handcuff this subject.

While Rollins was on the ground attempting to subdue the subject who had tried to flee, two other men attacked Rollins. Rollins felt someone trying to grab his belt and pull him off of the subject on the ground. Surveillance footage from several camera angles showed that defendant, who was wearing a black and white striped shirt, approached Roberts and Rollins, braced himself with his hand on a pickup truck, looked both ways, raised his foot high, and then stomped on the back of Rollins's head. Then a second man wearing a red sweatshirt, Bernardo Alonzo,⁴ kicked Rollins in the face immediately after the first kick. Anderson described this second kick as a "punt type kick" and "somewhat powerful," and Fehr described the second kick as "a full-energy foot kick." Rollins did not feel that there was any period of time in between the kicks so that he could

⁴ Alonzo was originally charged as defendant's co-defendant but later pleaded guilty to one count of assault with force likely to produce great bodily injury.

distinguish them. Additionally, Rollins could not say which kick was more powerful because the second kick quickly followed after the first. Rollins felt like this second kick was to the jaw because his jaw was sore when he “came back to,” but he was not sure exactly where on his head he was kicked.

Rollins lost consciousness and his vision and hearing were temporarily impaired. Likewise, Anderson testified that after Rollins was kicked twice, Rollins “wasn’t fully there.” Deputy Pamela Depuy, who responded to a report about the incident, observed that Rollins appeared disoriented and was rubbing his eyes, and he told her he was seeing spots. Deputy Depuy advised Rollins to seek medical attention. Later that night, one of the other guards took Rollins to Mercy Hospital, where a CAT scan was ordered prior to being examined by Dr. Michael Jasumback. Dr. Jasumback concluded that Rollins had a minor concussion and jaw contusion.

The following day, January 16, 2011, Deputy Depuy made contact with Rollins a second time to interview him about the incident. She had been unable to get a statement from Rollins when she was at the casino the prior night because he was too disoriented due to his head injury. Rollins stated that shortly after feeling the tugging on his clothes, he felt a kick to the back of his head and then another kick to his face.

Dr. Jasumback testified that there was no way of knowing which kick caused the concussion. He testified that it may have been either kick or a combination of both and that multiple blows to the head can have an additive effect.

Verdicts

On January 24, 2012, the jury returned verdicts of guilty on both counts. Defendant requested a bifurcated court trial on the strike and prison prior allegations. That same day, the court found all the enhancements true.

***Romero* Motion and Sentencing**

Defendant filed a *Romero* motion requesting that the trial court exercise its discretion to strike two of his prior strikes under section 1385. After a hearing, the court

issued an order denying defendant's motion to strike. The court denied probation and sentenced defendant to state prison for 25 years to life on the first count due to defendant's two prior strikes, and the court imposed one year for the prior prison term. The court stayed the sentence on the second count pursuant to section 654.

DISCUSSION

I. Causation Instruction

A. Background

Prior to instructing the jury, the trial court provided a packet of proposed instructions for counsel to review. The court asked the attorneys to go through the instructions and raise any objections. The court then went through the proposed instructions with counsel one by one off the record to make notes on any objections and make modifications. Thereafter, the court went on the record, listing each instruction it planned to give the jury, including CALCRIM No. 240, and gave the attorneys another opportunity to object. Neither attorney raised objections. The court later instructed the jury with CALCRIM No. 240: "An act causes injury if the injury is the direct, natural, and probable consequence of the act and the injury would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence. [¶] There may be more than one cause of injury. An act causes injury, only if it is a substantial factor in causing the injury. A 'substantial factor' is more than a trivial or remote factor. However, it does not have to be the only factor that causes the injury."

During the rebuttal argument, the prosecutor referenced CALCRIM No. 240: "[D]efense counsel did not argue at all about 240, the -- CALCRIM 240 which is the... causation instruction. What defense counsel argued was that the defendant's acts alone did not cause the serious bodily injury. Well, CALCRIM 240 doesn't state that.... [¶] What CALCRIM 240 tells you is that there may be more than one cause of an injury.

What you have to decide as a jury is whether the defendant's actions, this stomp, this overt act where he looks both ways before he brings his foot down on Cody's head is a substantial factor in causing the injury.... [T]he jury instruction allows for this type of situation where there are two acts which can cause an injury. You as a jury have to decide whether the defendant's actions were a substantial factor, and the instruction tells you that a substantial factor is one more than a trivial or remote factor.”

B. Assault with Force Likely to Produce Great Bodily Injury

Before addressing defendant's central contention, we must first note that defendant asks for too much. He contends we should reverse the judgment and remand for a new trial because of the purported instructional error. Yet the purported error here goes to the issue of who caused the serious bodily injury inflicted upon the victim. That issue is relevant only to Count 2, battery with serious bodily injury. Section 245, subdivision (a)(1), required only that the prosecution show defendant committed an assault by means of force *likely* to produce great bodily injury. Actual injury is not required to support a conviction. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028; *People v. Brown* (2012) 210 Cal.App.4th 1, 7; *People v. Roth* (1964) 228 Cal.App.2d 522, 530.) Thus, the cause of the concussion sustained by the victim is immaterial to Count 1. Accordingly, we reject defendant's claim of instructional error as to Count 1, assault by means of force likely to produce great bodily injury.

C. Battery with Serious Bodily Injury - Analysis

We now consider defendant's claim of instructional error as it relates to Count 2, battery with serious bodily injury, the count for which the trial court stayed the sentence pursuant to section 654.

Defendant contends that CALCRIM No. 240 “was an erroneous statement of the law, and since the case was a close one, it must be considered reversible error.” Specifically, defendant argues that his culpability should have been evaluated under the “ ‘superseding cause’ ” test and that the jury should have been instructed to determine

whether the second kick was caused by defendant or the result of “ ‘independent will.’ ”⁵ If we conclude that defendant forfeited this argument by failing to raise it below, defendant alternatively claims that his counsel was ineffective in failing to object to CALCRIM No. 240. We reject both contentions.

1. Forfeiture

The People contend that defendant forfeited his claim on appeal that the court erred in giving CALCRIM No. 240 because he did not object below. Defendant counters that this instruction was an incomplete statement of the law without an instruction on superseding cause and he is entitled to appellate review of this alleged error despite his failure to object below because the error affected his substantial rights. (See § 1259 [an appellate court may review an instruction, even in the absence of an objection below, if the defendant’s substantial rights were affected].)

However, it is well-established that “[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.” (*People v.*

⁵ Defendant argues that “[California] Rules of Court, [r]ule 855 recommends that the CALJIC instruction be utilized unless the court ‘finds that a different instruction would more accurately state the law and be understood by jurors.’ ” Defendant appears to be behind the times. He cites a long since repealed rule related to CALJIC. The CALCRIM instructions “are the official instructions for use in the state of California.” (Cal. Rules of Court, rule 2.1050(a).) “Use of the Judicial Council instructions is strongly encouraged. If the latest edition of the jury instructions approved by the Judicial Council contains an instruction applicable to a case and the trial judge determines that the jury should be instructed on the subject, it is recommended that the judge use the Judicial Council instruction unless he or she finds that a different instruction would more accurately state the law and be understood by jurors. Whenever the latest edition of the Judicial Council jury instructions does not contain an instruction on a subject on which the trial judge determines that the jury should be instructed, or when a Judicial Council instruction cannot be modified to submit the issue properly, the instruction given on that subject should be accurate, brief, understandable, impartial, and free from argument.” (Cal. Rules of Court, rule 2.1050(e).)

Lang (1989) 49 Cal.3d 991, 1024; see also *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163-1165 [challenge to generally correct but potentially misleading instruction forfeited for failure to seek modification].) If defendant believed CALCRIM No. 240 was an incomplete statement of the law, then it was incumbent upon him to suggest appropriate additional or clarifying language. (*People v. Welch* (1999) 20 Cal.4th 701, 757; *People v. Sully* (1991) 53 Cal.3d 1195, 1218; *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118-1119.)

Defendant relies heavily on *People v. Cervantes* (2001) 26 Cal.4th 860 for support of his instructional error contention. In *Cervantes*, our high court outlined the law of causation as follows: “ ‘In general, an “independent” intervening cause will absolve a defendant of criminal liability. [Citation.] However, in order to be “independent” *the intervening cause must be “unforeseeable ... an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause.”* [Citation.] On the other hand, a “dependent” intervening cause will not relieve the defendant of criminal liability. “A defendant may be criminally liable for a result directly caused by his act even if there is another contributing cause. If an intervening cause is a normal and reasonably foreseeable result of defendant’s original act the intervening act is ‘dependent’ and not a superseding cause, and will not relieve defendant of liability. [Citation.] ‘[] The consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. [] The precise consequence need not have been foreseen; it is enough that the defendant should have foreseen the possibility of some harm of the kind which might result from his act.’ [Citations.]” (*Id.* at p. 871, italics added.) Thus, the key is foreseeability of the intervening cause.

CALCRIM No. 240 encompasses the principles of foreseeability in that it defines a “natural and probable consequence” of an act that causes an injury as “one that a reasonable person would know is likely to happen if nothing unusual intervenes.” Therefore, CALCRIM No. 240 provides a correct summary of the law of causation that

adequately covers superseding cause, even if it does not elucidate the doctrine in detail. As this court has previously held, a defendant “is not entitled to remain mute at trial and scream foul on appeal for the court’s failure to expand, modify, and refine standardized jury instructions.” (*People v. Daya* (1994) 29 Cal.App.4th 697, 714.) Thus, because the CALCRIM No. 240 instruction was a correct statement of the law of causation and defendant did not propose any clarification or addition to the instruction, he is precluded from claiming it was incomplete or insufficient on appeal.

Moreover, even if defendant had not forfeited the issue, there is no support for his argument that the court erred in failing to sua sponte give an instruction on superseding cause. As we have explained, CALCRIM No. 240 adequately instructed the jury on the doctrine of superseding cause. Furthermore, defendant does not identify an instruction or *specific* language for an instruction the trial court should have given but instead provides an amorphous analysis of the general rules of proximate cause and complains the jury was not instructed on “ ‘independent will’ ” concerning Alonzo’s kick. The People contend that defendant is essentially proposing that the court should have given a pinpoint instruction on superseding cause.

A pinpoint instruction “relates particular facts to an element of the charged crime and thereby explains or highlights a defense theory.” (*People v. Mayfield* (1997) 14 Cal.4th 668, 778; see also *People v. Saille* (1991) 54 Cal.3d 1103, 1119-1120; *People v. Wright* (1988) 45 Cal.3d 1126, 1138.) The burden is on the defendant to request a pinpoint instruction, and it is the defendant’s obligation to frame the instruction. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 669.) The trial court’s duty to give pinpoint instructions arises only upon request. (*Saille, supra*, 54 Cal.3d at pp. 1119-1120; see also *People v. Ervin* (2000) 22 Cal.4th 48, 91.) A trial court is not required to give a pinpoint instruction sua sponte. (See, e.g., *People v. Jennings* (2010) 50 Cal.4th 616, 674-675.)

Here, whether what could have been proposed is correctly characterized as a pinpoint instruction or a clarifying instruction, defendant did not object to the instruction

that was given or propose a modification, alternative or addition to the trial court. The matter is forfeited.

2. Ineffective Assistance of Counsel

Defendant contends that if his instructional error claim was forfeited, then his trial counsel was ineffective in failing to request an “adequate” instruction on superseding cause.

To establish ineffective assistance of counsel, a defendant must show (1) counsel’s performance was below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance prejudiced defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 691-692 [80 L.Ed.2d 674] (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217 (*Ledesma*).) “ ‘Surmounting *Strickland*’ s high bar is never...easy.’ ” (*Harrington v. Richter* (2011) 562 U.S. 86, ___ [178 L.Ed.2d 624, 642] (*Richter*), quoting *Padilla v. Kentucky* (2010) 559 U.S. 356, ___ [176 L.Ed.2d 284, 297].) When “the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged,” “unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, these cases are affirmed on appeal.” (*People v. Pope* (1979) 23 Cal.3d 412, 426 (*Pope*).)

Defendant cannot show that his trial counsel’s performance was deficient merely by showing that counsel did not prepare and request a special or modified instruction that was potentially applicable to the case. As long as there could have been some satisfactory explanation for the decision to not request a special or modified instruction, a claim of ineffective assistance must be rejected on direct appeal. (See *Pope, supra*, 23 Cal.3d at p. 426.) On the record here, we conclude that defendant’s trial attorney could have reasonably determined that requesting a special instruction on superseding cause

was not necessary.⁶ Courts are not required to give special instructions that merely duplicate other instructions. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 99; *People v. Earp* (1999) 20 Cal.4th 826, 901-903.)

In any event, the CALCRIM No. 240 instruction contemplates precisely this sort of situation where more than one assailant uses force on the victim and causes an injury, and it appropriately explains foreseeability and independent intervening acts.⁷ It

⁶ We note again that defendant has not bothered to suggest the specific wording for the instruction he says should have been given. Thus, we decide the issue of ineffective assistance of counsel somewhat in the abstract because we have no specific instruction to compare to what the court gave.

⁷ The prosecution proceeded on the theory that defendant was a direct perpetrator and did not advance an aiding and abetting theory. An aider and abettor could be equally guilty of battery with serious bodily injury as the person who caused the injury.

When a defendant is charged with personally inflicting great bodily injury under section 12022.7, there is a separate jury instruction applicable in group beating cases, CALCRIM No. 3160. (See *People v. Dunkerson* (2007) 155 Cal.App.4th 1413, 1414-1415, 1417-1418.) The relevant portion of CALCRIM No. 3160 reads: “If you conclude that more than one person assaulted <insert name of injured person> and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily injury on <insert name of injured person> if the People have proved that: [¶] 1. Two or more people, acting at the same time, assaulted <insert name of injured person> and inflicted great bodily injury on (him/her); [¶] 2. The defendant personally used physical force on <insert name of injured person> during the group assault; [¶] AND [¶] [3A. The amount or type of physical force the defendant used on <insert name of injured person> was enough that it alone could have caused <insert name of injured person> to suffer great bodily injury(;/.)] [¶] [OR] [¶] [3B. The physical force that the defendant used on <insert name of injured person> was sufficient in combination with the force used by the others to cause <insert name of injured person> to suffer great bodily injury.] [¶] The defendant must have applied substantial force to <insert name of injured person>. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.]”

The trial court did not give the group-beating portion of CALCRIM No. 3160. We are unaware of any published case that discusses whether the group beating portion of CALCRIM No. 3160 should be used in a battery with serious bodily injury case and

specifically defines a “natural and probable consequence” of an act that causes an injury as “one that a reasonable person would know is likely to happen if nothing unusual intervenes” -- essentially a statement of the doctrine of superseding cause.

Even assuming, *arguendo*, that trial counsel should have requested some different instruction on superseding cause as defendant proposes, defendant has failed to show how he was prejudiced by counsel’s failure to do so. In order to establish prejudice, “[i]t is not enough ‘to show that the errors had some conceivable effect on the outcome of the proceeding.’ ” (*Richter, supra*, 562 U.S. at p. ____ [178 L.Ed.2d at p. 642].) To show prejudice, defendant must show a reasonable probability that he would have received a more favorable result had counsel’s performance not been deficient. (*Strickland, supra*, 466 U.S. at pp. 693-694.) “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Id.* at p. 694; accord, *Ledesma, supra*, 43 Cal.3d at p. 218.)

As we have noted, our high court has said that when an intervening cause is a normal and reasonably foreseeable result of defendant’s original act, the intervening act will not relieve defendant of liability. (*Cervantes, supra*, 26 Cal.4th at p. 871.) The consequence need not be probable; it need only be a “possible consequence which might reasonably have been contemplated.” (*Id.*) Defendant need not personally foresee the act. “ ‘[I]t is enough that the defendant *should have* foreseen the possibility of some harm of the kind which might result from his act.’ ” (*Id.*, italics added)

Here, defendant’s stomp to the back of the victim’s head allowed Alonzo to deliver a clean, unblocked kick to the victim’s face. The testimony indicated that defendant and Alonzo kicked Rollins with roughly equal force and in quick succession. Surveillance footage showed that defendant and Alonzo were in a group of men drinking

neither party contends it has applicability here. Consequently, we have no occasion to address the issue.

together on the sidewalk outside the casino just before their group started fighting with another man. Given that earlier beat down by defendant's group and the attempt to flee when the security guards arrived, it was reasonably foreseeable that someone else would also assault the victim after defendant stomped the victim's head in an effort to get the victim off of one of the other members of the group the victim was attempting to subdue. These circumstances establish that assistance in beating the victim here was not so unusual, abnormal, or extraordinary that it could not be foreseen that additional blows would be struck by others. As we have noted, CALCRIM No. 240 contemplates this sort of situation where more than one assailant uses force on the victim resulting in injury and appropriately explains foreseeability. Thus, the jury had the concept of foreseeability in mind when it convicted defendant. We conclude there is not a reasonable probability defendant would have received a more favorable result had the jury heard an instruction including the words, " 'independent will,' " since " 'independent' " must be further defined as unforeseeable.

Defendant does not develop his contention that he was prejudiced beyond contending that this was a "close case." Defendant bases his claim that this was a close case on two circumstances -- the jury deliberated for one hour in a case in which it took five hours to present the evidence and that the jury asked to review the surveillance footage during deliberations, the latter of which he claims is the equivalent of asking "for readback." The argument that a one-hour jury deliberation indicates a close case is disingenuous at best, and in a case relying extensively on surveillance videos, it is reasonable that the jury would request to review the footage again before rendering a verdict. Contrary to defendant's assertion, these tealeaves of the jury's deliberative process do not indicate that this was a close case or that defendant was somehow prejudiced by his counsel not requesting a duplicative instruction on superseding cause.

Accordingly, defendant has not shown a reasonable probability that he would have received a more favorable result on Count 2, battery with serious bodily injury, had counsel requested the special instruction.

II. *Romero* Motion

Defendant next contends that the trial court abused its discretion in denying his *Romero* motion to strike two of his qualifying prior convictions. (See *Romero, supra*, 13 Cal.4th at pp. 529-530.) Defendant contends the court should have exercised its discretion to strike the strikes, arguing that “at age 25, he would be receiving a potential life sentence; that only one of his priors (the Penal Code section 245(a) conviction) involved violence; that there was evidence he was an addict; that he only kicked the victim in the instant offense one time; that he was planning to return to school and had some work experience; that the incident was the result of unusual circumstances; and that he had plenty of support in the community.” We are not persuaded.

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.)

We review the trial court’s decision of whether to strike a prior conviction under the abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*)). Dismissal of a strike is a departure from the sentencing norm. Accordingly, in reviewing a ruling on a *Romero* motion, we will not reverse for abuse of discretion unless the defendant shows that the decision was “so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* 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 we will affirm “ [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....’ ” (*Ibid.*, quoting *People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

Here, the record reflects that the trial court was well-aware of its discretion and appropriately exercised that discretion in considering the various factors. Specifically, the court indicated that it reviewed the probation report, the pleadings and arguments of counsel, the various letters provided in support of defendant, defendant’s age and work history, and defendant’s criminality and gang-related activities. The court considered that defendant’s prior strikes were “on the cusp of increasing dangerousness” and that defendant is “on the move to greater offenses.” The court concluded that defendant would be a “flat-out danger to society” if not sentenced to 25 years to life. The record supports this conclusion.

When defendant was 19, he pleaded guilty to possession of a short barreled shotgun (§ 12020, subd. (a)) and assault with a deadly weapon (§ 245, subd. (a)(1)), admitting a gang allegation related to the shotgun possession (§ 186.22, subd. (b)(1)(A)) and an allegation that he committed the assault while out on bail (§ 12022.1, subd. (a)). While that charge was pending, defendant stabbed a person four times during a fight at a party, and he was sentenced to prison. Shortly after he was released on parole, defendant received a DUI and was sent back to prison for the parole violation. Just several months after his second release from prison on parole, defendant kicked Rollins at the casino.

Considering the facts and circumstances of defendant’s past and present offenses, the court found that defendant was likely affiliated with a gang, repeatedly violated court orders and parole, and tended to “reoffend immediately.” Moreover, the court found that defendant likely acted in concert with Alonzo and that because defendant kicked Rollins first, defendant potentially drew Alonzo into kicking Rollins a second time. Based on all the evidence before it, the court declined to exercise its discretion to strike any strikes. In other words, the trial court “ ‘balanced the relevant facts and reached an impartial

decision in conformity with the spirit of the law....’ ” (*Carmony, supra*, 33 Cal.4th at p. 378.)

Defendant contends that *People v. Bishop* (1997) 56 Cal.App.4th 1245 (*Bishop*) is analogous to his case and requires reversal. *Bishop* is nothing like this case.

In *Bishop*, the appellate court upheld the trial court’s decision to dismiss two of three strikes where all three crimes (robberies) were committed 17 to 20 years before the defendant’s current offense of petty theft. (*Bishop, supra*, 56 Cal.App.4th at pp. 1247-1248.) The *Bishop* court reasoned that the nature of the present crime (petty theft) and the remoteness of defendant’s prior violent offenses may operate to mitigate his Three Strikes sentence. (*Ibid.*)

The instant case is clearly distinguishable from *Bishop*. Unlike *Bishop*, the commitment offense crime involved violence and defendant’s prior crimes of violence were not remote. Furthermore, defendant was on parole at the time he committed the instant act of violence. And unlike 50-year-old Bishop, who had passed the prime years of criminal activity, defendant was only 24 years old at the time of this case and, as the trial court noted, was “on the move to greater offenses.”

Defendant’s recent act of violence, framed within a recent history of increasingly serious criminal activity, places this case squarely within both the letter and spirit of the three strikes law. Accordingly, we find no error.

DISPOSITION

The judgment is affirmed.

MURRAY, J.

We concur:

BLEASE, Acting P. J.

DUARTE, J.