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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.

RAYMOND SANTONIO BLAIR,

Defendant and Appellant.

C075618

(Super. Ct. No. 13F04605)

A jury found defendant Raymond Santonio Blair guilty of infliction of corporal injury resulting in a traumatic condition, battery with serious bodily injury, false imprisonment by means of violence or menace, and being a felon in possession of tear gas or a tear gas weapon. After denying defendant's request to dismiss a strike prior (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497), the trial court sentenced him to an aggregate term of 16 years and four months in prison, which included a consecutive

one-year, four-month term on the false imprisonment conviction and a concurrent four-year term on the tear gas conviction.

On appeal, defendant contends: (1) the trial court erred in ruling that his prior acts of domestic violence, offered to show propensity under Evidence Code section 1109, could be proven with a certified copy of his misdemeanor domestic violence convictions, rather than live testimony regarding those crimes; (2) Penal Code section 654 barred separate punishment for the false imprisonment conviction; and (3) the trial court abused its discretion in denying his *Romero* request. We reject defendant's contentions but on our own conclude that the trial court erred in imposing a prison sentence on defendant for his conviction of being a felon in possession of tear gas or a tear gas weapon because that crime is a misdemeanor. Accordingly, we will affirm defendant's convictions but remand for resentencing.

#### FACTUAL AND PROCEDURAL BACKGROUND

In July 2013, after her work shift ended at about 10:00 or 11:00 p.m., Crystal G. returned to the apartment she shared with her boyfriend, defendant. Defendant was home. Crystal brought a coworker, Monique S., with her. After dinner, the three talked in the living room. The conversation turned into an argument about the meaning of a Spanish word and defendant became angry. Crystal told defendant to calm down but he started swearing at her. Crystal and defendant went into a bedroom and argued. Monique heard a "thud" and went to the bedroom to tell Crystal that they should leave. When Crystal crawled out of the bedroom, she was crying and some of her hair extensions were missing. Defendant grabbed Crystal and pulled her back into the bedroom.

When defendant and Crystal came out of the bedroom, they were yelling, hitting, and pushing each other. Crystal went outside the apartment and the door closed. Monique, who was still inside, asked defendant to let Crystal leave. The door opened and Crystal started to enter. Defendant shoved Crystal very hard, causing her to hit her head

on the stairs outside. As a result, Crystal suffered a huge gash on her forehead. A lot of blood ran down Crystal's face, onto her clothes, and on the ground. Monique and Crystal walked toward Monique's car, planning to go to the hospital. Defendant followed, telling Monique that she could leave but calling Crystal a "bitch" and yelling that she was not "going anywhere." Crystal tried to get into the passenger side of Monique's car but defendant grabbed her. Monique left but stopped her car not too far away from the apartment and called 911, reporting what had occurred. Her 911 call was played for the jury.

Just before 5:00 a.m., Citrus Heights Police Officers Wesley Herman and Michael Wells responded to a call reporting an active verbal and physical disturbance at an apartment complex. They heard a man yelling and saw a light in one of the units. Officer Herman looked inside the partially uncovered window and saw defendant standing in the middle of the bedroom. Defendant was yelling but Officer Herman could not see anyone else. Both officers heard a sound, possibly that of a body being thrown against the wall. They went to the front door of the apartment and saw a pool of blood on the ground. Dispatch had informed them that someone who had witnessed portions of the incident had called 911. Based on the information received, the officers believed someone's life was in danger and kicked open the front door. They announced their presence and went to the bedroom, where they found defendant standing at the foot of the bed and Crystal cowering in the corner with a blood-soaked cloth against her head. Defendant was arrested. A search of his person revealed a canister of pepper spray in his pants pocket. At the hospital, Crystal received five stitches to close the gash on her forehead.

Prior to trial, the prosecution moved in limine pursuant to Evidence Code section 1109 to introduce certified copies of defendant's 2011 misdemeanor convictions for battery and criminal threats against the mother of his child to prove defendant's propensity to commit acts of domestic violence. In support of the motion, the

prosecution relied on Evidence Code section 452.5, subdivision (b) and *People v. Wesson* (2006) 138 Cal.App.4th 959.

Defendant opposed the motion, arguing (among other things) that the record of conviction did not reveal the extenuating circumstances and that his Sixth Amendment right to confront and cross-examine witnesses would be violated by the introduction of court copies of his prior convictions rather than the witness's live testimony.

At the hearing on the motion, defendant argued that he would have to testify and explain why he entered a plea to the misdemeanor offenses. The prosecutor claimed that the certified record of the prior offenses minimized the prejudicial impact because only the least adjudicated elements would be presented to the jury and nothing prevented defendant from calling the witness.

The trial court ruled that the prior convictions could be proven with certified copies of those convictions. Subsequently, the parties stipulated that on July 20, 2011, defendant was convicted of two misdemeanors -- criminal threats and battery -- against the mother of his child. The parties also stipulated that on September 21, 2009, defendant was convicted of felony burglary.

The jury found defendant guilty of all four charges against him. In connection with the inflicting corporal injury charge, the jury found defendant personally inflicted great bodily injury on the victim. In connection with the battery charge, the jury found defendant personally inflicted serious injury. In bifurcated proceedings, defendant admitted his first degree burglary conviction as a strike prior, a prior serious felony conviction, and as the basis for a prior prison term.

After denying defendant's request to dismiss the strike prior, the court sentenced defendant to an aggregate term of 16 years and four months in prison, including a consecutive one-year, four-month term on the false imprisonment conviction and a concurrent four-year term on the tear gas conviction. In finding that the false imprisonment with violence offense was independent of the inflicting corporal injury

offense, the trial court stated as follows: “This went beyond a domestic-violence situation, in that there were instances, according to trial testimony, where the victim was trying to leave to go to the hospital to get treatment and help, and the defendant actively prohibited her from doing so.”

## DISCUSSION

### I

#### *Admission Of Certified Copies Of Prior Convictions*

Defendant first contends the trial court erred in ruling that his prior acts of domestic violence, offered to show propensity under Evidence Code section 1109, could be proven with a certified copy of defendant’s misdemeanor domestic violence convictions, rather than live testimony regarding those crimes. He argues that “[t]he court admitted certified copies of his prior convictions without weighing the similarity between the current offense and the prior offense” and thereby “failed to engage in the required analysis of Evidence Code section 352 factors.” He also contends “the admission was a violation of [his] right to confrontation and due process under the United States Constitution, Sixth and Fourteenth Amendments.” We find no merit in these arguments.

Evidence Code section 1109, subdivision (a)(1) provides that “evidence of the defendant’s commission of other domestic violence is not made inadmissible by section 1101 if the evidence is not inadmissible pursuant to Section 352.” In *Wesson*, the court held that under Evidence Code section 1108 -- a parallel statute allowing admission of evidence of other sexual offenses to prove a propensity to commit such offenses -- the prior offense or offenses can be proven with court documents, as opposed to live testimony. (*People v. Wesson, supra*, 138 Cal.App.4th at pp. 967-969.) Defendant claims this case is distinguishable from *Wesson* because there “the trial court weighed the factual similarity of the prior offense and the current offense” in determining the

admissibility of the prior acts under Evidence Code section 352, but here the trial court did not do so. We disagree.

In *Wesson*, the defendant contended “the jury can only make its determination as to a defendant’s propensity to commit the charged offense if the prosecution produces the testimony of witnesses regarding the details of the prior conduct.” (*People v. Wesson*, *supra*, 138 Cal.App.4th at p. 969.) He asserted that in his case “there were significant differences between the two incidents” because “the prior incident involved forcible oral copulation and sexual battery against a stranger while the charged offenses were forcible sexual penetration and sodomy against his girlfriend.” (*Ibid.*) The appellate court rejected this argument as follows: “First, the trial court considered the issue of similarity in its analysis under section 352. We agree with its conclusion that both the prior and charged offenses involved forcible sexual offenses against adult women, and thus the prior offenses were probative as to defendant’s propensity to commit the charged offenses. Second, had defendant wanted to emphasize that the prior offenses were dissimilar because they involved a stranger, he was free to subpoena [the victim of the prior offenses] to present such evidence.” (*Ibid.*)

Although the trial court here did not make an express comparison of defendant’s prior offenses to the current offenses on the record, the court did expressly find “the propensity evidence to be relevant” “based on the facts and circumstances of the case.” Thus, the trial court weighed the factual similarity of defendant’s prior offenses to the charged offenses, just like the trial court did in *Wesson*. And like the appellate court in *Wesson*, we agree with the trial court here that defendant’s prior offenses were probative of his propensity to commit domestic violence, inasmuch as his prior offenses involved battery and criminal threats against the mother of his child, and the current offenses involved battery and infliction of corporal injury on his live-in girlfriend. Accordingly, use of the certified record of defendant’s prior convictions did not prevent the trial court from conducting the analysis required by Evidence Code section 352.

As for defendant's argument that use of the court records violated the confrontation clause, that argument lacks merit because the records sought to be introduced here were not "testimonial." Prior conviction records under Penal Code section 969b are "prepared to document acts and events relating to convictions and imprisonments. Although they may ultimately be used in criminal proceedings, as the documents were here, they are not prepared for the purpose of providing evidence in criminal trials or for determining whether criminal charges should issue. Therefore, these records are beyond the scope of *Crawford* [*v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177]]." (*People v. Taulton* (2005) 129 Cal.App.4th 1218, 1225; see *People v. Moreno* (2011) 192 Cal.App.4th 692, 710-711.)

## II

### *Penal Code Section 654*

Defendant next contends that Penal Code section 654 (section 654) barred his punishment for false imprisonment because his intent and objective in committing this offense was the same as his intent and objective in inflicting corporal injury on Crystal, namely, "to prevent [Crystal] from leaving, not to injure her." According to defendant, "[t]he assault, which resulted in [Crystal] hitting her head on the staircase, was incidental to [his] objective to keep her from leaving." We reject this argument and conclude that sufficient evidence supports the trial court's finding that section 654 did not bar separate punishment.

Section 654, subdivision (a), provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision . . . ." "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of

such offenses but not for more than one.” (*Neal v. State of California* (1960) 55 Cal.2d 11, 19; see also *People v. Correa* (2012) 54 Cal.4th 331, 336.) “On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for the independent violations committed in pursuit of each objective even though the violations were parts of an otherwise indivisible course of conduct.” (*People v. Perez* (1979) 23 Cal.3d 545, 551-552.) The purpose of section 654 is “to insure that a defendant’s punishment will be commensurate with his culpability.” (*Perez*, at p. 552.)

“A trial court’s implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence.” (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

Defendant’s reliance on *People v. Martinez* (1980) 109 Cal.App.3d 851 is misplaced. There, the defendant was convicted of assault with intent to commit rape and false imprisonment. After assaulting the victim, the defendant dragged the victim under a bridge where he attempted to rape her. After he stopped trying to rape the victim, the defendant held her for a few moments and tried to convince her not to report the offenses to the police. (*Id.* at pp. 854, 858.) The *Martinez* court concluded that the two offenses “involved the same criminal event” and section 654 applied to prohibit punishment for both. (*Martinez*, at p. 858.) *Martinez* was criticized in *People v. Saffle* (1992) 4 Cal.App.4th 434, in which the court held that the trial court did not violate section 654 by imposing separate punishment for sex offenses and false imprisonment, because after the defendant completed the sex offenses, his objective changed to trying to prevent the victim from reporting the crimes. (*Saffle*, at pp. 438-440.)

Here, substantial evidence supports the trial court’s finding that section 654 authorized separate punishment. On the evidence here, the trial court could have reasonably found that defendant’s objective in shoving Crystal out the door and into the stairwell was to hurt her, not to keep her from leaving, which was his objective

throughout much of the rest of the incident, from when he dragged Crystal back into the bedroom to when he pulled her away from Monique's car. Under these circumstances, the trial court did not err in refusing to stay the sentence for false imprisonment.

### III

#### *Romero*

Finally, defendant contends the trial court abused its discretion in denying his *Romero* request. We do not find any abuse. The probation report recounted the 30-year-old defendant's criminal history. At 16 years of age, he was adjudged a ward of the court after he possessed cocaine for sale. He was continued a ward at 17 and 18 years of age after he received stolen property and possessed marijuana. At 19 years of age, defendant committed second degree robbery and was granted probation subject to 10 months in county jail. At 25 years of age, he was convicted of first degree burglary and sentenced to prison for four years. When he was 28 years old, defendant was convicted of domestic battery and criminal threats, both misdemeanors, and was granted probation subject to 31 days in jail. The victim of the domestic battery obtained a restraining order, which defendant violated. He was convicted of a misdemeanor for the violation. When defendant was arrested for the current offense, he was on active parole and formal probation.

The probation report also recounted defendant's background. Defendant reported he had been in foster care from six to 12 years of age because his mother could not support him and he was subject to physical and sexual abuse in six to seven different foster homes. When he returned to his mother's care, he blamed the neighborhood in which he lived for his troubles and dropping out of school. Defendant worked part time as a general laborer and attended a local college. He claimed he was doing well on parole. Defendant reported that he took medications for a bipolar disorder. Although he told the probation officer he did not consume alcohol or use controlled substances, the

probation officer noted that when he was arrested in the current case, he admitted having consumed alcohol.

Defendant emphasized his background and argued that striking the strike prior was appropriate given his mental health issues and the fact that the current offense was minor, a “trivial drunken argument that went too far--and by too far, [he] mean[t] resulted in a four centimeter cut.”

Noting the information in the probation report, the trial court denied defendant’s request to strike the strike prior, stating that despite defendant’s unfortunate background, “he has had many, many, opportunities to turn his life around” but continued to commit crimes and to violate probation and parole, resulting in a significant record. The court concluded, “The facts and circumstances of his repeated inability to comply with rules of society and his acts of violence do not lend itself to the Court striking the strike.” In contending the trial court abused its discretion in denying his *Romero* request, defendant claims the trial court failed to “adequately” consider his arguments and failed to consider that the “current offense was not severe” and adequately punished by the base term and enhancement, as well as a term for the false imprisonment. He claims his 2008 first degree burglary, which was used as a strike prior and a five-year enhancement, did not involve a confrontation with anyone in the residence. Although he recognizes that the trial court considered his upbringing, he argues that the trial court failed to consider his progress as an adult, in that he was employed, going to school, and had a plan. We reject defendant’s contentions.

A sentencing court may strike a strike prior if the defendant falls outside the spirit of the three strikes law. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) The court considers “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.” (*Ibid.*)

The court’s dismissal of a strike prior is a departure from the sentencing norm. We do not reverse the trial court’s denial of a *Romero* request unless the defendant shows the ruling was “so irrational or arbitrary that no reasonable person could agree with it.” (*People v. Carmony* (2004) 33 Cal.4th 367, 377-378.) Where 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.’ ” (*Id.* at p. 378.)

Here, the trial court considered defendant’s arguments, having reviewed the probation report, which included defendant’s explanation of his background as well as defense counsel’s written request to strike the strike prior. As the trial court correctly noted, defendant had had many opportunities but continued his life of crime. As the trial court found, defendant’s background, character, and prospects reflect him as someone who has demonstrated a repeated inability to comply with the rules of society. Contrary to defendant’s claim that his “current offense was not severe,” his current felony offenses were more severe than his most recent misdemeanor offenses of domestic battery, criminal threats, and violation of a restraining order. On the record before us, defendant has failed to demonstrate that the trial court abused its discretion in denying his *Romero* request.

## IV

### *Sentence For Possessing Tear Gas*

Although defendant did not raise this issue, we note an error in the sentence imposed for defendant's conviction of possessing tear gas or a tear gas weapon.<sup>1</sup> Penal Code section 22810, subdivision (a) provides that "[n]o person convicted of a felony . . . shall purchase, possess, or use tear gas or any tear gas weapon," but that provision does not specify the punishment for its violation. *Use of tear gas or a tear gas weapon except in self-defense is punishable "by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months, or two or three years or in a county jail not to exceed one year or by a fine not to exceed one thousand dollars (\$1,000), or by both the fine and imprisonment" (Pen. Code, § 22810, subd. (g)), but the unlawful possession of tear gas or a tear gas weapon is punishable only "by imprisonment in the county jail for not exceeding one year or by a fine not to exceed two thousand dollars (\$2,000), or by both that fine and imprisonment" (id., § 22900).*

Here, the evidence showed only possession, not use; accordingly, it was error for the trial court to sentence defendant to prison for this offense. Thus, while we affirm defendant's convictions, we must remand for resentencing.

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<sup>1</sup> In the interest of judicial economy, we have resolved this error without first requesting supplemental briefing. Any party claiming to be aggrieved may petition for rehearing. (Gov. Code, § 68081.)

DISPOSITION

Defendant's convictions are affirmed, but the case is remanded for resentencing.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.