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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY EMIL DAVIS,

Defendant and Appellant.

D057606

(Super. Ct. No. SCD222828)

APPEAL from a judgment of the Superior Court of San Diego County, Frank A. Brown, Judge. Affirmed.

A jury convicted Larry Emil Davis of one count of robbery (Pen. Code,¹ § 211; count 1), victim Ana Dobles, and one count of attempted robbery (§§ 211, 664; count 2), victim Amelia Negrete. In a bifurcated proceeding, Davis admitted suffering two prior convictions that qualified as prison priors within the meaning of sections 667.5, subdivision (b) and 668, and one conviction that qualified both as a serious prior felony,

¹ All statutory references are to the Penal Code unless otherwise noted.

within the meaning of sections 667, subdivision (a)(1), 668 and 1192.7, subdivision (c), and as a "strike" prior within the meaning of sections 667, subdivisions (b) through (i), 668 and 1170.12. The trial court sentenced Davis to 12 years in state prison.

On appeal, Davis argues: (1) the trial court erred in refusing to grant his motion for mistrial after one of the People's witnesses inadvertently testified in contravention of a court order that Davis was subject to a parole search when he was detained by police shortly after the crime; (2) insufficient evidence supports his attempted robbery conviction; and (3) the trial court abused its discretion when it allegedly considered factors outside the "Three Strikes" law in refusing to strike his prior "strike" offense. As we explain, we disagree and affirm the judgment of conviction.

FACTUAL AND PROCEDURAL OVERVIEW²

At all times relevant in this appeal, Dobles owned a candy shop located on El Cajon Boulevard in San Diego. On September 11, 2009, Dobles was working at her shop along with her employee, Negrete. Around 2:00 p.m., an African-American man with a trimmed beard and small mustache, later identified as Davis, entered the shop and inquired about purchasing a piñata. At the time, Davis was wearing sunglasses, a dark T-shirt with a small badge or tag on it, faded dark jeans with distinctive stitching on the rear pockets, blue underwear that was exposed because of his sagging pants and a dark-colored "beanie" or do-rag covering his head. A female customer was also in the shop.

² We view the evidence in the light most favorable to the judgment of conviction, to the extent there is a conflict in the evidence. (See *People v. Osband* (1996) 13 Cal.4th 622, 690.) Certain portions of the factual and procedural history related to Davis's claims of alleged error are discussed *post*, in connection with those issues.

Dobles asked Davis, who was standing about three feet away, if he was looking for a particular type of piñata and whether the piñata was for a girl or boy. Davis responded the piñata was for a girl, but was not sure what character he wanted. Davis said he would return to the shop when he made his decision, and left.

About five minutes later, after the female customer had gone, Davis returned to the candy shop. Dobles testified Davis entered the shop holding a black pistol and demanded money from Dobles, who was now alone in the front of the shop. Frightened, Dobles yelled and then ran to the back of the shop where Negrete was working. Dobles told Negrete that Davis had a gun. Davis followed Dobles and according to Dobles, pointed the gun at both women and told them to get down on the floor. Rather than follow Davis's instructions, Dobles told Davis the money was in the cash register in the front. Dobles then followed Davis to the front of the shop.

As Davis walked to the front, he confronted Kelly Morgan. Morgan testified he had been outside walking to his car when he heard a "tremendous scream" from inside the shop. Curious, Morgan went inside the shop to investigate. Because initially he did not see anybody inside the shop, Morgan "hollered" he wanted to buy a soda. Shortly thereafter, a man later identified as Davis came from the back, approached Morgan and when they were about two feet away, told Morgan the shop was closed.

Morgan in the past had purchased sodas from the shop. When Davis told him the shop was closed, Morgan became perplexed because he knew that Davis did not own the shop. Davis told Morgan to leave and come back later.

Dobles walked to the front of shop and told Morgan they were open for business. Morgan testified that Dobles appeared frightened. With Morgan still inside, Davis walked back and forth between two counters, repeatedly demanding money from Dobles. Because Morgan sensed something was not right, he began to back out of the shop. As he did, Dobles said, "No, no, no, we're not closed," causing Morgan to remain inside.

Morgan testified he saw Davis come close to the counter, near Dobles. At that point, Dobles pulled out a can of pepper spray and sprayed Davis, who was still wearing sunglasses. Initially, the spray did not seem to have much effect on Davis. Dobles then sprayed Davis a second time. In response, Davis said, "this lady is crazy" and "I don't know what she is tripping on." After being sprayed a second time, Morgan saw Davis point a shiny pistol at Dobles's chest and saw Davis move closer to Dobles and actually put the pistol on her chest. At that point, Morgan realized Davis was robbing the shop. Morgan backed out of the shop and said out loud two or three times, "He's got a gun, he's robbing her," and words to that effect.

Morgan did not know if the pistol Davis was holding was real or fake. Morgan nonetheless did not want to take any chances. Morgan heard Dobles scream again and then saw Davis leave the shop with the pistol, saying: "I don't know what's wrong" with her, "she must be crazy" and other words to that effect. Morgan saw Davis run down the block and turn left at the corner.

About 30 minutes later, police drove Morgan to a location a few blocks from the shop for a curbside lineup. Morgan almost immediately identified Davis as the robber. Morgan's identification was based on the distinctive pattern on the pockets of Davis's

jeans, the blue underwear that was visible from Davis's sagging jeans and the tear drop tattoos under Davis's left eye, all of which Morgan had observed while Davis was inside the shop.

Dobles testified that after Davis returned to the front of the shop, he started pushing buttons on the cash register to try and open it. Dobles pulled out a "stun gun" from underneath the cash register and tried to use it on Davis, but the stun gun did not work. Dobles then pepper sprayed Davis. According to Dobles, the pepper spray also did not seem to work on Davis. At that point, he came around the counter and stood near her. Inside an open drawer under the cash register was a silver toy pistol. Davis grabbed the pistol from the drawer and aimed it at Dobles while standing about two feet from her. After a few seconds, Dobles testified that Davis left the shop holding the silver pistol.³

While Dobles was attempting to use the stun gun and pepper spray Davis, Negrete called police. Morgan, who was then outside the shop looking in, also flagged down a police car.

Detective Scott Henderson was in an alley near the candy shop on an unrelated call when he heard the broadcast about the robbery. Henderson saw Davis, who was then shirtless, riding a bicycle in the alley. Henderson stopped Davis, asked him some questions and concluded that Davis was a possible suspect in the robbery.

While Davis was being detained, he asked Henderson to wipe Davis's face with the shirt Davis was holding. Immediately after doing so, Henderson felt a stinging

³ Davis does not dispute his robbery conviction in count 1, which was based in part on his taking from the shop the silver toy pistol belonging to Dobles's nephew.

sensation on his own face, which Henderson described as feeling like he had been pepper sprayed. Henderson searched Davis and found a plastic handgun. During a second search conducted a short time later by Officer Daniel Meyer, police found a second gun on Davis, which also was fake.

Police recovered a hat and do-rag near the candy shop. DNA recovered from the do-rag matched Davis's DNA.

Shortly after the robbery, police conducted curbside lineups. Even without a shirt, head covering and glasses, Dobles was 100 percent certain that Davis was the man who robbed the shop. Negrete, like Morgan, also identified Davis as the robber at a separate lineup. Negrete based her identification on Davis's distinctive pants and features, including his facial hair.

At trial, Dobles, Negrete and Morgan each identified Davis as the robber.

DISCUSSION

A. *Motion for Mistrial*

1. *Additional Background*

Davis contends the trial court should have granted a mistrial because the prosecution's witness, Meyer, almost immediately after taking the stand inadvertently testified that when he arrived in the alley, an African-American male later identified as Davis was handcuffed and Henderson "was performing a search incident to his *parole status*." (Italics added.) Defense counsel immediately requested a sidebar conference.

In chambers, defense counsel moved for a mistrial based on the parole reference, arguing the statement was highly prejudicial and was in contravention of an earlier court

order excluding such evidence. The prosecutor claimed the comment was made so quickly that she did not hear it, but also acknowledged she had failed to admonish the officer before he took the stand not to mention Davis's criminal history.

The trial court and defense counsel agreed the parole reference was inadvertent. Nonetheless, defense counsel argued a mistrial was necessary because the "bell" could not be "unrung." The prosecutor in response asked the trial court to admonish the jury to disregard the *brief* testimony Meyer already had given and to allow the prosecutor to start over with this witness.

After a recess and outside the presence of the jury, the trial court noted there was case law (including *People v. Harris* (1994) 22 Cal.App.4th 1575, discussed *post*) factually similar to the situation before it and based on this law, the court intended to deny the motion for mistrial and admonish the jury "that the last statement made by the witness, Meyer, [be] disregard[ed] . . . and ask them if they can follow that instruction to disregard, then admonish it is not to enter their deliberations in any way."

In response, defense counsel argued there was no cure for the error. The trial court disagreed, noting: "I have to make a call. Either I'm going to declare a mistrial, which seems foolish in the light of the *People v. Harris* case, which was shepardized by our staff and found to be good law. [¶] And trial judges are supposed to exercise common sense. That's what we're paid to do. And we're two and a half days into this. [¶] And I said earlier, you know, if this were a misdemeanor, I wouldn't give it two seconds thought. I'd just admonish the jury and go on. But it's a serious case. And so I gave it a lot of thought. Heard a lot of, the record will reflect, a lot of off-the-record

discussions. . . . So I'm satisfied that my discretion, for me, is reasonable. Now, whether everybody agrees with my thinking, I don't think that's the case. [¶] But I'm not going to waste two and a half days. . . . I don't have any fear of doing an injustice by taking this course of action and denying, righteously denying -- or denying your righteous motion for mistrial."

After ensuring the prosecutor had admonished Meyer not to repeat when testifying his reference to Davis's parole status or other criminal history, the trial court instructed the jury as follows:

"Now, after consulting with both lawyers, we have decided to start anew with Officer Meyer's testimony. [¶] If you'll recall, during jury selection at the beginning of this trial, I asked you, I said sometimes things happen and I admonish the jury to strike or to disregard information that may be added to a question not asked of a witness. Remember that, when I said that? Okay. Now, I want to ask all 15 of you -- and I make a finding that all 12 jurors are here, Mr. Davis, both lawyers, witness is here, and my alternates.

"I'm admonishing you all we're going to strike everything Meyer had just testified to. Everything is gone. Can you all follow that? Yes? Anybody can't follow that?

"And by strike I mean you're not to let it, anything that me may have said so far, enter your deliberations in any way. [¶] Can you all follow that instruction? Is there anybody that has any residue or any possibility that that would creep into deliberations? If so, tell me now. [¶] Okay. You can all do that? You can separate what he said?

"We know who he is. So we don't have to go through identifying him. It's Meyer back again. We'll start anew, fresh testimony from this witness, because I'm satisfied, from the response of the jury and the alternates, that they'll follow that strict instruction."

Before his cross-examination, the trial court instructed the jury to cross out any notes it had taken of Meyer's earlier, stricken testimony: "Okay. . . . I noticed that jurors have been taking notes. The first part that was stricken, make sure that you run lines through that, please, so that you don't inadvertently violate my admonishment not to let the previous statements of this witness enter your deliberations. So make sure, okay? I have your commitment to do that?"

Defense counsel renewed his motion for mistrial the following day. In again denying the motion, the court noted it had given the issue "some thought" because it wanted to be "fair" and "in compliance with the case law in this regard." The court noted the parole comment was "inadvertent" and "flushed by" the prosecutor and the court because it was made so quickly. In addition, the court noted that out of an abundance of caution it had excluded Davis's prior criminal history, including the prior robbery conviction, which "quite possibly could have been admitted" under Evidence Code section 1101, and although "sensitive" to the issue, it determined the jury could and would follow its instructions to disregard the parole statement.

2. Governing Law

"Whether in a given case the erroneous admission of such evidence warrants granting a mistrial or whether the error can be cured by striking the testimony and admonishing the jury rests in the sound discretion of the trial court. [Citation.] ' "A

mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." [Citation.] Although most cases involve prosecutorial or juror misconduct as the basis for the motion, a witness's volunteered statement can also provide the basis for a finding of incurable prejudice. [Citation.] [Citation.]" (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1581; see also *People v. Valdez* (2004) 32 Cal.4th 73, 128 [a mistrial motion "should *only* be granted when a defendant's 'chances of receiving a fair trial have been irreparably damaged.' " Italics added.])

3. *Analysis*

In light of the singular mention by Meyer of Davis's parole status, which comment was, in any event, fleeting, and in light of the court's admonishment to the jury to disregard any of Meyer's brief, initial testimony, including any notes taken of such testimony, we conclude the trial court properly exercised its discretion in denying Davis's motion for mistrial.

Moreover, the jury was instructed both before trial commenced and after closing argument not to consider any "evidence" stricken from the record. We presume the jury followed those instructions, and, in any event, there is no evidence in the record suggesting otherwise. (See *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Assuming *arguendo* the trial court erred in exercising its discretion and denying Davis's motion for mistrial, we conclude that error was harmless because on this record it

was not reasonably probable that Davis would have achieved a more favorable outcome absent the "error." (See *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Harris*, *supra*, 22 Cal.App.4th at p. 1580.)

Indeed, the evidence in the record shows there was overwhelming evidence of Davis's guilt, despite his argument otherwise. (See *People v. Harris*, *supra*, 22 Cal.App.4th at p. 1581 [overwhelming evidence of guilt supported trial court's decision to deny motion for mistrial based on inadvertent comment about parole officers made by witness during cross-examination].) The key issue at trial was identity of the robber.

On this issue, the record shows that Dobles, Negrete and Morgan each identified Davis shortly after the incident as the robber at separate curbside lineups, and again at trial. The identifications were based on the distinctive jeans Davis wore; his teardrop tattoos; his facial hair; the pepper spray that was on the shirt Davis was holding that caused Henderson to feel a stinging sensation on his own face; the two fake handguns recovered from Davis, including the one that matched the description taken from the drawer underneath the cash register inside the shop; and Davis's DNA on the do-rag worn by the robber.

We conclude based on the above evidence that there is no reasonable probability that Davis would have received a more favorable outcome absent the fleeting comment by Meyer about Davis's parole status. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) For this separate and independent reason we conclude the trial court properly denied the motion for mistrial.

B. *Attempted Robbery*

Davis next argues his conviction for the attempted robbery of Negrete must be reversed because there is insufficient evidence supporting the jury's finding that Davis had a specific intent to take property from Negrete by force or fear.

1. *Additional Background*

Davis was charged in count 2 with attempted robbery of Negrete. The trial court properly instructed the jury on attempted robbery as follows:

"The defendant is charged in Count Two with Attempted Robbery.

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant took a direct but ineffective step toward committing Robbery

AND

"2. The defendant intended to commit Robbery.

"A *direct step* requires more than merely planning or preparing to commit Robbery or obtaining or arranging for something needed to commit Robbery. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to commit Robbery. It is a direct movement towards the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.

"A person who attempts to commit Robbery is guilty of attempted Robbery even if, after taking a direct step towards committing the crime, he or she abandoned further efforts to complete the crime or if his or her attempt failed or was interrupted by someone or something beyond his or her control. On the other hand, if a person freely and voluntarily abandons his or her plans before taking a direct step toward committing Robbery, then that person is not guilty of Attempted Robbery.

"To decide whether the defendant intended to commit Robbery, please refer to the separate instructions that I will give you on that crime.

"The defendant may be guilty of attempt even if you conclude that Robbery was actually completed." (CALCRIM No. 460.)

As required by the attempt instruction, the trial court also properly instructed the jury on the offense of robbery:

"The defendant is charged in Count One with robbery.

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant took property that was not his own;

"2. The property was taken from another person's possession and immediate presence;

"3. The property was taken against that person's will;

"4. The defendant used force or fear to take the property or to prevent the person from resisting;

AND

"5. When the defendant used force or fear to take the property, he intended to deprive the owner of it permanently.

"The defendant's intent to take the property must have been formed before or during the time he used force or fear. If the defendant did not form this required intent until after using the force or fear, then he did not commit robbery.

"A person takes something when he or she gains possession of it and moves it some distance. The distance moved may be short.

"The property taken can be of any value, however slight. Two or more people may possess something at the same time.

"A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person.

"A store or business employee may be robbed if the property of the store or business is taken, even though he or she does not own the property and was not, at that moment, in immediate physical control of the property. If the facts show that the employee was a representative of the owner of the property and the employee expressly or implicitly had authority over the property, then that employee may be robbed if property of the store or business is taken by force or fear.

"*Fear*, as used here, means fear of injury to the person himself or herself, or injury to the person's family or property, or immediate injury to someone else present during the incident or to that person's property.

"Property is within a person's *immediate presence* if it is sufficiently within his or her physical control that he or she could keep possession of it if not prevented by force or fear.

"An act is done *against a person's will* if that person does not consent to the act. In order to *consent*, a person must act freely and voluntarily and know the nature of the act." (CALCRIM No. 1600.)

2. *Governing Law*

When a defendant challenges the sufficiency of the evidence to support his or her conviction, we examine the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence from which the jury could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576, 578.) Substantial evidence means evidence that is "reasonable, credible, and of solid value" that supports each essential element of an offense. (*Id.* at p. 578.) A judgment of conviction will not be set aside for insufficiency of the evidence to support the jury's verdict unless it is clearly shown there is no basis on which the evidence can support the jury's conclusion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

As the trial court properly noted, the crime of attempt requires a specific intent to commit a crime and a direct, but ineffectual, act done toward its commission. (*People v. Reed* (1996) 53 Cal.App.4th 389, 398; CALCRIM No. 460.) Thus, to establish the crime of attempted robbery the prosecution must prove the specific intent to commit robbery and a direct, unequivocal, overt act toward its commission. (*People v. Vizcarra* (1980) 110 Cal.App.3d 858, 862; see also *People v. Jones* (1999) 75 Cal.App.4th 616, 627.)

" '[T]he intent required for robbery . . . is seldom established with direct evidence but instead is usually inferred from all the facts and circumstances surrounding the crime.' [Citation.]" (*People v. Abilez* (2007) 41 Cal.4th 472, 506-507.) When the intent to commit the crime is clearly shown, an act done toward the commission of the crime may be sufficient for an attempt even though that same act would be insufficient if the intent is not as clearly shown. (*People v. Bonner* (2000) 80 Cal.App.4th 759, 764.)

The overt act necessary to supply the second element of an attempt need not be the last proximate act prior to the commission of the crime itself. (*People v. Parrish* (1948) 87 Cal.App.2d 853, 856.) Therefore, other than forming the requisite criminal intent, a defendant need not commit an element of the underlying offense. (*People v. Medina* (2007) 41 Cal.4th 685, 694.) " 'Although mere preparation such as planning or mere intention to commit a crime is insufficient to constitute an attempt, acts which indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design will be sufficient. [Citations.]' " (*People v. Jones, supra*, 75 Cal.App.4th at p. 627, fn. omitted; see also *People v. Toledo* (2001) 26 Cal.4th 221, 230 ["When a defendant acts with the requisite specific intent, that is, with the intent to engage in the conduct and/or bring about the consequences proscribed by the attempted crime [citation], and performs an act that 'go[es] beyond mere preparation . . . and . . . show[s] that the perpetrator is putting his or her plan into action' [citation], the defendant may be convicted of criminal attempt." Fn. omitted].)

When a person's design to commit a crime is clearly shown, " 'slight acts done in furtherance of that design will constitute an attempt, and the courts should not destroy the practical and common-sense administration of the law with subtleties as to what constitutes preparation and what constitutes an act done toward the commission of a crime.' [Citations.]" (*People v. Memro* (1985) 38 Cal.3d 658, 698, overruled on another ground as stated in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.) "[W]hen the acts are such that any rational person would believe a crime is about to be consummated absent an intervening force, the attempt is underway" (*People v. Dillon* (1983) 34 Cal.3d 441, 455.)

3. *Analysis*

Here, based on the entirety of the record we conclude there was substantial evidence that Davis entered the candy shop with the specific intent to rob it. Indeed, the record shows that when he first entered the shop, Dobles and Negrete were both in the front with a customer. Davis asked about a piñata and then abruptly left only to return a few minutes later after the customer had left. When Davis returned, he had a gun in his hand and demanded money from Dobles, who was then alone in the front of the shop. Dobles ran to the back of the shop where Negrete was working and yelled there was a man with a gun inside the shop. Negrete became frightened. At that point, Davis approached both women with a gun in his hand and yelled to get down on the floor.

Thus, the record contains ample evidence to support the jury's findings in count 2 that Davis intended to rob the shop where Negrete was working by using force or fear and that with respect to Negrete, he took a direct but ineffective step toward its

commission when he was unable to open the cash register with his free hand while holding a gun in his other hand. (See *People v. Scott* (2009) 45 Cal.4th 743, 750 [recognizing " ' "a store employee may be the victim of a robbery even though he is not its owner and not at the moment in immediate control of the stolen property." ' "]; *People v. Medina, supra*, 41 Cal.4th at p. 694; CALCRIM No. 460; see also *People v. Dillion, supra*, 34 Cal.3d at p. 456 [evidence of attempted robbery of marijuana farm sufficient where there was clear intent to rob and defendants armed and disguised themselves, which acts went beyond mere preparation, even though defendants did not actually enter the marijuana field].)⁴

C. Refusal to Strike Prior "Strike" Offense

Finally, Davis argues the trial court abused its discretion in refusing to strike his prior robbery conviction because in making that determination the court inappropriately relied on Davis's lack of remorse and failure to take a "plea deal" offered by the People.

1. Governing Law

We review a trial court's decision not to strike a prior under the "deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374; see also *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530–531.) Under this standard, a " ' "decision will not be reversed merely because reasonable people might disagree" ' " ; rather, "a trial court will only abuse its discretion in failing to strike a

⁴ Although the People were *not* required to prove beyond a reasonable doubt that Davis did in fact use force or fear against Negrete to support the attempted robbery conviction in count 2 (see CALCRIM No. 460; *People v. Dillon, supra*, 34 Cal.3d at pp. 453-454), the record nonetheless contains substantial evidence to support such a finding.

prior felony conviction allegation in limited circumstances[, such as] where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible facts in declining to dismiss [citation], [or where] 'the sentencing norms [established by the Three Strikes law may, as a matter of law,] produce[] an "arbitrary, capricious or patently absurd" result' under the specific facts of a particular case.

[Citation.]" (*People v. Carmony, supra*, 33 Cal.4th at pp. 377–378.)

A trial court must also " 'consider whether, in light of the nature and circumstances of [the defendant's] 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 been previously convicted of one or more serious and/or violent felonies' [citation]" before exercising its discretion to strike a felony conviction. (*People v. Carmony, supra*, 33 Cal.4th at p. 377; *People v. Williams* (1998) 17 Cal.4th 148, 161.)

2. Analysis

Here, the record shows the trial court clearly was aware of its discretion and offered a thorough explanation of the limits of that discretion and its reason for refusing to strike Davis's strike prior. The trial court noted that even after he was convicted in the instant case, Davis continued to claim that he was not the robber and thus showed no remorse for what he had done, and that Davis continues to do the same "stuff" because Davis was not "getting it," when viewed in light of his lengthy criminal record.

Although the trial court mentioned Davis's decision not to take the People's offer when discussing the issue, the record shows the overarching reason given by the trial

court in refusing to strike the strike prior was Davis's extensive criminal history. (See *People v. Williams, supra*, 17 Cal.4th at p. 161 [in deciding whether to strike a prior conviction, a trial court "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."].)

Indeed, the record shows the trial court reviewed Davis's probation report, which shows Davis has suffered at least eight convictions in three different states. In addition, at the time of the instant offense Davis was on parole in California and in Georgia, and his probation officer noticed Davis's performance on parole and probation was "really bad."

The trial court also noted that in 1995 Davis was sentenced to state prison for dealing in controlled substances. "Then, in '97 he got receiving stolen property and a petty theft. Then he got probation. [¶] And then in '99 he got busted for having somebody's personal I.D., but that [charge was] dismissed because he pled guilty to robbery -- I guess another charge. . . .

"And then a robbery occurred in 2000. And in that case he entered the finest doughnuts. . . . And he removed a handgun from his waistband, pointed it at the victim, same as he did this time. He was arrested a half mile away. Same as he was this time. And the cops recovered a plastic handgun. Same as he had this time.

"And then he had some more drug problems and attitude problems apparently with the El Cajon P[olice] D[e]partment]. Then a burglary on Magnolia. Then some other criminal trespass in Georgia? Then lying to the cops in Georgia. Then in '08 he has a problem with police officers, I guess, attitude with a police officer. So I mean he won't stop."

Thus, the record supports the trial court's finding that Davis has not led a legally blameless life since his prior robbery conviction. (See *People v. Strong* (2001) 87 Cal.App.4th 328, 338 ["[T]he overwhelming majority of California appellate courts have . . . affirmed the refusal to dismiss[] a strike of those defendants with a long and continuous criminal career."].)

In any event, to the extent the trial court in part improperly relied on Davis's decision not to take the plea deal in deciding not to strike Davis's prior robbery conviction, we conclude that error was harmless as it is not reasonably probable that the court would have given Davis a more favorable sentence absent this factor, when viewed in light of Davis's lengthy criminal history and his refusal to take responsibility for the instant crime. (See *People v. Holguin* (1989) 213 Cal.App.3d 1308, 1319 ["The mere fact a trial court erroneously relies upon certain factors in imposing an upper term does not per se require reversal" and "[r]eversal is only required where there is a reasonable probability the trial court would sentence the defendant differently absent the erroneous factors."]; see also Cal. Rules Court, rule 4.408(a).

DISPOSITION

The judgment of conviction is affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.