

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

TYRONE ROSHAWN AUSTIN,

Defendant and Appellant.

D057885

(Super. Ct. No. SCD222914)

APPEAL from a judgment of the Superior Court of San Diego County, Margie G. Woods, Judge. Affirmed.

A jury convicted Tyrone Roshawn Austin of robbery (Pen. Code,¹ § 211) and found true allegations that he personally used a firearm in the commission of the offense (§ 12022.5, subd. (a)). In a bifurcated hearing after Austin waived a jury trial on his prior convictions, the trial court found true allegations that Austin had suffered one prior serious felony conviction (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)) and five prior

¹ All statutory references are to the Penal Code.

strike convictions (§§ 667, subds. (b)-(i), 1170.12). It denied Austin's motion to dismiss his prior strike convictions and sentenced him to a total term of 34 years to life, consisting of an indeterminate term of 25 years to life on the robbery charge and consecutive determinate terms of five years for the prior serious felony and four years for the firearm use allegation.

Austin contends there is insufficient evidence he personally used a firearm in the commission of the robbery. He further contends the trial court abused its discretion by refusing to strike four of his five prior strike convictions under section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. Austin asks us to reverse the judgment and remand the matter for resentencing so that the court can apply the relevant legal standards for dismissal of a strike conviction. We affirm the judgment.

FACTUAL BACKGROUND

On the morning of September 17, 2009, Guadalupe Consuelo was working as a cashier at a market located on 20th Street in San Diego. At 8:00 a.m., a little more than an hour after she had opened the store and counted the cash in the registers, a dark-skinned man mostly covered with a beige-colored rag approached, stood right next to her, and pointed a large black gun at her. The man demanded that Consuelo give him the money, telling her he did not want to hurt her. Consuelo fumbled with the register but finally opened it and took out the tray. The man grabbed the money and asked if she had more. She recalled the tray contained about \$250 to \$260 in cash before the man arrived.

Two other customers were in the market that morning. David Hill was standing at the cash register paying for his items and talking to the other customer when he saw what

he thought was a homeless man enter the store. Hill saw the man come up with a black gun and point it at the clerk. He described the gun as a big gun, "like a 45" with a "big hole in the end of it." Hill ran out of the market and hid, then called 911. He saw just the robber's eyes and part of his nose, but he could tell he was an African-American male, and he described him as wearing a dirty T-shirt with a dirty hooded jacket wrapped around his face, and dark-colored baggy pants.

The other customer, Sherperson Thomas, saw the man raise the gun at Consuelo and say, "Give me the money." Thomas, himself a handgun owner familiar with guns, described the assailant's gun as big and black with a brown handle; to him it "looked like a Beretta .45, something like that." Thomas recalled telling police that the gun might have been a fake plastic gun based on the sound it made when the man hit it against the counter. On cross-examination, Thomas nevertheless testified that the gun looked "totally" real to him and frightened him:

"[Prosecutor]: And when you looked at that [gun] and you saw what amend [*sic*] to be possibly a Beretta .45, it looked real to you.

"[Thomas]: Yeah. Totally.

"[Prosecutor]: And the way the person, the robber, held it, he was displaying it in a manner which would have been, in your opinion, real; is that correct?

"[Thomas]: Yes.

"[Prosecutor]: And actually he pointed the gun and lifted his arm and pointed it at the victim; is that correct?

"[Thomas]: Yes.

[¶] . . . [¶]

"[Prosecutor]: You were scared, correct?"

"[Thomas]: Yes.

"[Prosecutor]: You thought it was real at that moment while you were in the store.

"[Thomas]: Totally."

Thomas testified he left the area because he thought Consuelo might get shot and he wanted to call police.

About twenty minutes later, police detained Austin, who was found with approximately \$260 in his socks. Consuelo identified Austin as the assailant, and Austin's DNA was found on clothing resembling that worn by the assailant during the robbery and discarded about two blocks away from the market.

DISCUSSION

I. *Sufficiency of the Evidence*

Austin contends the jury's finding that he personally used a firearm in the commission of the robbery is not supported by substantial evidence. Applying the language of CALCRIM No. 3146, he specifically maintains there is no evidence he used " 'a device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.' " Austin points to the fact the prosecution did not produce the gun used in the robbery, and also to Thomas's testimony that the gun he saw in the assailant's hands might have been fake.

Well settled standards apply to Austin's sufficiency of the evidence challenge. We determine " "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citations.] We examine the record to determine "whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] Further, "the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." [Citation.] This standard applies whether direct or circumstantial evidence is involved. "Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." " " " " (*People v. Virgil* (2011) 51 Cal.4th 1210, 1263.) Reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support' " the jury's verdict. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

In *People v. Monjaras* (2008) 164 Cal.App.4th 1432 (*Monjaras*), a defendant displayed the handle of a black pistol tucked in his waistband and demanded the victim's purse. (*Id.* at p. 1436.) "The victim, who had seen guns before but had never handled

one, testified she immediately saw that the pistol looked like a gun, and it made her scared. She 'assumed' the pistol was 'real' and handed over her pocketbook. When asked by defendant's trial attorney what the pistol was made of, the victim said: 'Probably metal because—I don't know. Wasn't wood, wasn't plastic. I don't know if it was plastic or metal. . . . He don't show it to me. He just do "this" to me [pulled up his shirt and displayed the pistol].' The victim then conceded that she could not say for certain whether it was 'a toy or real or not.' " (*Ibid.*)

Based on this evidence, the jury found the defendant personally used a firearm within the meaning of section 12022.53, subdivision (b). (*Monjaras, supra*, 164 Cal.App.4th at p. 1434.) On appeal, the defendant raised a contention the court "thought had been put to rest" (*Id.* at p. 1435.) The defendant argued there was insufficient evidence to support the firearm use enhancement because the victim could not say whether the pistol in his waistband was a gun or a toy. The *Monjaras* court rejected this contention. Referring to the argument as "moribund," the appellate court explained the "[d]efendant was not engaged in a childhood game of cops and robbers; the robbery was real, and the evidence supports a reasonable inference that the pistol he used was a real firearm, not a toy." (*Id.* at p. 1435.) *Monjaras* conceded that toy guns, BB guns and pellet guns do not qualify as firearms. (*Ibid.*) However, it explained that while either direct or circumstantial evidence can establish the fact that an object used by a robber is a firearm, "[m]ost often, circumstantial evidence alone is used to prove the object was a firearm. This is so because when faced with what appears to be a gun, displayed with an explicit or implicit threat to use it, few victims have the composure and opportunity to

closely examine the object; and in any event, victims often lack expertise to tell whether it is a real firearm or an imitation. And since the use of what appears to be a gun is such an effective way to persuade a person to part with personal property without the robber being caught in the act or soon thereafter, the object itself is usually not recovered by investigating officers." (*Id.* at p. 1436.)

The *Monjaras* court reasoned: "The pistol tucked into defendant's waistband looked like a firearm, and it in effect communicated that it was a firearm when defendant menacingly displayed it and ordered the victim to give him her purse. While it is conceivable that the pistol was a toy, the jury was entitled to take defendant at his word, so to speak, and infer from his conduct that the pistol was a real, loaded firearm and that he was prepared to shoot the victim with it if she did not comply with his demand." (*Monjaras, supra*, 164 Cal.App.4th at p. 1437.)

Here, Austin's sufficiency of the evidence challenge fails on the same basis as in *Monjaras*. Consuelo, Hill and Thomas all saw Austin point what appeared to be a large black gun. Thomas, a gun owner, testified he believed the gun was a real semiautomatic .45-caliber firearm and it frightened both him and Hill, who also fled to call police. As in *Monjaras*, the "jury was not required to give [Austin] the benefit of [Hill's or Consuelo's] inability to say conclusively the pistol was a real firearm. This is so because '[Austin's] own words and conduct in the course of an offense may support a rational fact finder's determination that he used a [firearm].'" (*Monjaras, supra*, 164 Cal.App.4th at pp. 1436-1437.) "Simply stated, when as here a defendant commits a robbery by displaying an object that looks like a gun, the object's appearance and the defendant's conduct and

words in using it may constitute sufficient circumstantial evidence to support a finding that it was a firearm within the meaning of section 12022.53, subdivision (b). In other words, the victim's inability to say conclusively that the gun was real and not a toy does not create a reasonable doubt, as a matter of law, that the gun was a firearm." (*Id.* at p. 1437; see also *People v. Law* (2011) 195 Cal.App.4th 976.)

II. *The Court Did Not Abuse Its Discretion by Denying Austin's Motion to Strike His Prior Strike Convictions*

A. *Legal Principles*

Section 1385, subdivision (a) provides in part that a trial court "may, either of [its] own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." That provision permits a court to strike prior felony conviction allegations in cases brought under the "Three Strikes" law. (*People v. Superior Ct. (Romero)* (1996) 13 Cal.4th 497, 529-530 (*Romero*)). However, a "court's discretion to strike prior felony conviction allegations in furtherance of justice is limited. Its exercise must proceed in strict compliance with section 1385[, subdivision] (a), and is subject to review for abuse." (*Id.* at p. 530; *People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*); *In re Large* (2007) 41 Cal.4th 538, 550.)

In reviewing for abuse of discretion, we are guided by two principles. First, "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary." (*Carmony, supra*, 33 Cal.4th at pp. 376-377.) Without this 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.' " ' " (*Ibid.*) Thus, "a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it" or if " '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." (*Id.* at pp. 377, 378.) " '[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, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance.' " (*Id.* at p. 378.)

To determine whether to strike an allegation "in furtherance of justice," the court must balance "the constitutional rights of the defendant, and the interests of society represented by the People." (*Romero, supra*, 13 Cal.4th at pp. 530-531, italics omitted.) "[A] court abuses its discretion if it dismisses a case, or strikes a sentencing allegation, solely 'to accommodate judicial convenience or because of court congestion.' [Citation.] A court also abuses its discretion by dismissing a case, or a sentencing allegation, simply because a defendant pleads guilty. [Citation.] Nor would a court act properly if 'guided solely by a personal antipathy for the effect that the [T]hree [S]trikes law would have on [a] defendant,' while ignoring 'defendant's background,' 'the nature of his present offenses,' and other 'individualized considerations.' " (*Id.* at p. 531.) In deciding whether to dismiss a strike prior " 'in furtherance of justice' . . . the court in question 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 [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*)); see also *In re Large, supra*, 41 Cal.4th at p. 552.)

B. *Analysis*

Austin contends the court abused its discretion by denying his motion to strike four of his five strike prior convictions. Austin points out he had argued below that these prior convictions—all robberies—had occurred within a few months in 1996 when he was 19 years old and were "within the framework of one case," and thus did not present a scenario where he had been incarcerated and paroled but reoffended upon release. He argues he should be deemed outside the spirit of the Three Strikes scheme based on these circumstances and because his prior offenses were "significantly remote in time," he committed the priors after suffering significant personal and emotional difficulties, he furthered his education and took trade classes in prison, he has been treated for psychotic disorders and other medical conditions, he has lost a family member to homicide every year since 2006, and he did not cause injuries in connection with the present robbery offense.

Our role is not to decide the merits of Austin's motion anew, but rather to assess whether the court patently abused its discretion in balancing "the nature and circumstances of the defendant's present felonies and prior serious and/or violent felony

convictions, and the particulars of [the defendant's] background, character, and prospects." (*Williams, supra*, 17 Cal.4th at p. 161.) "The concept of discretion implies that, at least in some cases, a decision may properly go either way." (*In re Large, supra*, 41 Cal.4th at p. 553.) In keeping with this principle, the fact Austin can make a good argument for striking a strike prior in the furtherance of justice does not require reversal. (*Carmony, supra*, 33 Cal.4th at p. 378 [it is not enough to show that reasonable people might disagree about whether to strike one or more prior conviction allegations].) Further, the trial court was not required to state reasons for denying the motion. (*In re Large, supra*, 41 Cal.4th at p. 550.)² Austin "finds himself in the difficult position of having to rebut the 'strong presumption' [citation] that the trial judge properly exercised [her] discretion in refusing to strike a prior conviction allegation." (*In re Large*, at p. 551.)

The trial court's analysis of Austin's circumstances and the *Romero* factors spans approximately seven pages of reporter's transcript. The transcript shows the trial court knew the matter was within its discretion and understood the scope of its discretion. The court enumerated the factors to be examined, including "age, family status, mental

² "While a court must explain its reasons for striking a prior [citations], no similar requirement applies when a court declines to strike a prior [citation]. 'The absence of such a requirement merely reflects the legislative presumption that a court acts properly whenever it sentences a defendant in accordance with the three strikes law.' [Citation.] 'Thus, the three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper.' " (*In re Large, supra*, 41 Cal.4th at p. 550.)

faculties, medical problems, substance abuse, gang affiliations, treatment, rehabilitation, opportunities or issues, . . . the nature of the current offense, its seriousness, victim vulnerability, monetary loss, how active the defendant being sentenced participated, the sophistication of the crime, how the crime was planned, how it was carried [out], whether or not there was a position of trust." It stated it also looked at "the prior offenses, acts of violence, how old was the person when these acts of violence took place and . . . whether or not the . . . offense conduct was perhaps a single period of behavior that was unusual or aberrant." The court indicated it had carefully reviewed Austin's psychiatric evaluation to assess the issues Austin faced psychologically and emotionally based on his history, upbringing and background, and looked at his past and current functioning with regard to his mental status, ability and intelligence. The court stated it understood Austin's background was not his choice, and that it was "filled with suffering, difficulty and hardship."

The court went on to describe Austin's criminal history, noting at age 14 he was in the juvenile court system, but did not benefit from later efforts to get him out of his violent neighborhood; that as an adult Austin had become dependent on drugs and had difficulty with violence, including domestic violence; and Austin thereafter committed five separate robberies at gunpoint with his associates and gang members. The court observed that despite his 15-year sentence as a result of a plea bargain, Austin committed the same offense after less than one year of parole.

The trial court continued: "And so looking at all these other factors to determine whether or not the Court finds that Mr. Austin does not fall within the scheme of the

strike prior sentencing, the Court certainly has deep sympathy and does note there are difficulties, as described by [the evaluating psychiatrist]. [¶] But those difficulties didn't stop [Austin] from using his free will. . . . [¶] And the Court does not see any information here that Mr. Austin wasn't able to make a choice that had at least some basis—of an opportunity to have a basis to . . . think it over, to weigh the pros and cons, to decide whether or not it was worth it, to decide whether or not he wanted to place himself in a position where, if he's caught, he would most likely get a sentence that would keep him in prison for many, many years. [¶] And he made the choice. . . . [¶] So the Court would have to agree that it doesn't have any basis to use its discretion other than it would be a basis of Mr. Austin has had a difficult life, Mr. Austin had a childhood that wasn't filled with stability, consistency, opportunity, that he may not be an inherently violent person. He hasn't, so far, hurt anyone. But he used weapons and firearms that certainly could cause death and serious injury at a second's notice. [¶] And that's not enough. It doesn't give the Court a basis to say we should strike a strike or two strikes or three strike convictions. And it would be an abuse of the Court's power if the Court were to find that the conduct of Mr. Austin, the choices he's made, does not fall within the scheme of the [Three Strikes] sentencing. It does."

The court acknowledged further the victims in the community, and found striking Austin's strikes would constitute an abuse of discretion as it would "expose them to a person who is willing to take the risk of . . . potentially hurting or killing an individual to take something that is not his by robbery" The court accordingly denied Austin's motion.

Austin cannot show the trial court's decision was arbitrary or capricious or the result absurd given the facts of this case. The trial court had before it the details of Austin's criminal history and it obviously considered the nature and date of Austin's prior strikes and the nature of his current offense. It was within reason for the court to conclude, under all of the circumstances, Austin was not wholly "outside the scheme's spirit" (*Williams, supra*, 17 Cal.4th at p. 161), and that it should not strike Austin's prior strikes. We cannot say the court's refusal to strike his four strike priors was "so irrational or arbitrary that no reasonable person could agree with it." (*Carmony, supra*, 33 Cal.4th at p. 377.)

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.