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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD DARRELL TURNER,

Defendant and Appellant.

D059665

(Super. Ct. No. JCF22429)

APPEAL from a judgment of the Superior Court of Imperial County, Matias R. Contreras, Judge. (Retired Judge of the Imperial Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

A jury convicted Richard Darrell Turner of selling cocaine base. The trial court later found true a prior strike allegation and a Penal Code section 12022.1 allegation, but found the prosecution had not met its burden as to a prison prior allegation.

(Undesignated statutory references are to the Penal Code.) The trial court sentenced Turner to a total prison term of eight years, consisting of the four-year midterm, doubled because of the strike. Turner appeals, contending (1) the evidence did not support his

conviction, (2) the trial court abused its discretion in failing to strike his prior strike conviction under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), and (3) the trial court erred by imposing a \$50 probation report fee. We reject his arguments and affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

At about 10:30 on the morning of April 17, 2008, Andrew Gaxiola and a friend decided to buy some crack cocaine. They drove to the east side of El Centro, an area known for its drug activity, in Gaxiola's friend's Dodge Intrepid. The men purchased crack from an African-American man wearing a blue sports jersey. After consuming the drugs, the men went back to the same area about an hour later to purchase more.

That same day, agents with the Imperial County Narcotics Task Force were involved in a surveillance operation on El Centro's east side. At about 11:30 a.m., Special Agent Miguel Carbajal observed a Dodge Intrepid driving along Hope Street. Agent Carbajal also saw an individual wearing a blue jersey, later identified as Turner, walking up and down Hope Street. Agent Carbajal watched Turner approach the driver's side window of the Intrepid and hand an item to someone in the car. About 20 minutes later, Special Agent John Moreno contacted Turner. Agent Moreno did not see any other African-American males in the area wearing blue jerseys.

Turner asked the officers what they wanted and started walking away. As Agent Moreno and his partner tried to talk to Turner, Turner "became uncooperative, started reaching [and] doing stuff." This caused Agent Moreno to take out his weapon and order Turner onto his knees. Agent Moreno conducted a patdown search but did not find any

contraband on Turner. He did not search every place on Turner that drugs could be stored. The agents let Turner go so they could continue their surveillance operation. Agent Moreno later referred the case to the district attorney's office to obtain a complaint and an arrest warrant.

In the meantime, other agents contacted Gaxiola. A search of Gaxiola revealed the "bundle" he had just purchased. The parties stipulated that the bundle contained .15 grams of cocaine base. Gaxiola told the officers that he purchased the drugs from a man wearing a blue jersey.

## DISCUSSION

### I. *Sufficiency of the Evidence*

In assessing challenges to the sufficiency of the evidence, we review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence from which a reasonable trier of fact could find guilt beyond a reasonable doubt. (*People v. Maury* (2003) 30 Cal.4th 342, 396.) It is not our function to reweigh the evidence (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206) and reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*People v. Thomas* (1992) 2 Cal.4th 489, 514.) Our sole function is to determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Marshall* (1997) 15 Cal.4th 1, 34.) Before a conviction can be set aside for insufficiency of the evidence, it must clearly appear that there is insufficient evidence to support it under any hypothesis. (*People v. Johnson* (1980) 26 Cal.3d 557, 575-578.)

Turner contends his conviction for selling cocaine base must be reversed because there was no direct evidence he knew the bindle contained a controlled substance and the circumstantial evidence did not show that he had any familiarity with cocaine base or any other controlled substances, or that he engaged in furtive acts or suspicious conduct indicating a consciousness of guilt. We disagree.

To prove the crime of selling a controlled substance, the prosecution must prove the defendant knew the character of the substance. (*People v. Coria* (1999) 21 Cal.4th 868, 874-875.) The narcotic nature of the substance sold by the defendant can be proved by circumstantial evidence and any reasonable inferences drawn from such evidence. (*People v. Tripp* (2007) 151 Cal.App.4th 951, 956.) For example, knowledge of the narcotic nature of a substance "may be shown by evidence of the defendant's furtive acts and suspicious conduct indicating a consciousness of guilt, such as an attempt to flee or an attempt to hide or dispose of the contraband [citations] . . . ." (*Ibid.*) Here, the jury could reasonably infer that Turner knew he sold a controlled substance to Gaxiola based on the circumstances.

Namely, agents observed Turner walking up and down the street in an area where drug users go to purchase crack cocaine. Agent Carbajal testified that crack cocaine sellers in the area were commonly African-Americans. Agents watched the individuals in the car obtain something from Turner. Agent Carbajal had previously witnessed more than 40 hand-to-hand drug transactions and believed he had just seen the men engage in a drug transaction. Gaxiola admitted that he purchased the cocaine base from Turner for \$20. Agents later found cocaine base on Gaxiola. When contacted by the police

immediately after the sale, Turner was uncooperative, attempted to walk away, and acted in such a manner that it caused Agent Moreno to draw his gun and order Turner to his knees.

Turner asserts Agent Moreno's testimony that he "started reaching [and] doing stuff" was too ambiguous to support a conclusion that he displayed a consciousness of guilt. While Turner is correct that Agent Moreno never explained what Turner did, Agent Moreno's acts of pulling out his gun and ordering Turner to his knees shows that Turner's movements were sufficiently suspicious to alarm the officer. Viewing this evidence in the light most favorable to the prosecution, there was persuasive circumstantial evidence to support a reasonable inference of the requisite knowledge by Turner.

## II. *Romero* Motion

Turner asserts the trial court erred when it denied his *Romero* motion because he does not fit within the spirit of the three strikes law as his current offense involved a small quantity of drugs, his prior strike offense was remote in time, his subsequent offenses were not violent and he was cooperative when arrested. Our review of the record convinces us that the trial court fully understood the scope of its discretion on the *Romero* motion and properly applied it.

In deciding whether to dismiss a prior conviction allegation under section 1385, a 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.) However, the court may not strike a sentencing allegation out of judicial convenience or because of court congestion, because a defendant pleads guilty, or out of personal antipathy for the effect that the three strikes law would have on a defendant. (*Romero, supra*, 13 Cal.4th at p. 531.)

We review the trial court's refusal to strike a prior conviction allegation for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) The defendant has the burden of showing that the sentencing decision was irrational or arbitrary. (*Id.* at p. 376.) Without such a showing, we must presume the trial court acted to achieve legitimate sentencing objectives and will not set aside its discretionary determination to impose a particular sentence unless its decision was so irrational or arbitrary that no reasonable person could agree with it. (*Id.* at pp. 376-377.)

Here, Turner suffered convictions in 1996 for assault with a deadly weapon, a brick, and unlawful possession of a controlled substance. In 1997 and 2002, he was convicted of being a felon in possession of a firearm. He suffered probation and parole violations in 2002, and another parole violation in 2004. After reading and considering the probation report and hearing the arguments of counsel, the trial court stated that although it had recently granted a *Romero* motion in a different case, it would not do so here finding that Turner's "situation is more what the legislature had in mind when they came up with a three strikes scheme. So I don't think that you really fall into that situation where the Court should strike the strike." However, based on the small quantity

of drugs involved, the trial court declined to impose the upper term and instead chose the middle term.

The trial court later stated that Turner was "in the wrong place" and that when a person is on probation and has a record, "you have to be so careful not to, you know, be caught doing anything wrong." It then noted that it looked at the record when Turner was previously sentenced and saw that the court had warned Turner to "be careful" and "to change [his] behavior.'" The court then imposed sentence.

Citing *People v. Thimmes* (2006) 138 Cal.App.4th 1207, Turner asserts the trial court improperly considered the prior court's warning to him to change his behavior as a factor when it denied the *Romero* motion. In *People v. Thimmes*, "the trial court impliedly found that defendant's background, character, and prospects weighed in favor of striking the strike," but declined to do so based on a presumption that the defendant had been warned of the impact of his prior conviction. (*Id.* at p. 1213.) The appellate court noted that the language used by the trial court suggested that the trial court "allow[ed] the prior conviction to operate upon the present conviction *because* defendant had previously been warned of the consequences." (*Ibid.*) The appellate court found that defense counsel had provided ineffective assistance because the defendant's prior conviction was not a strike; thus, the defendant could not have been warned as the trial court assumed. (*Id.* at pp. 1212-1213.)

Here, however, the trial court never implied it was inclined to strike the strike and the language it used did not suggest it weighed the prior court's warning as a factor in deciding the *Romero* motion. Rather, the trial court used the prior court's warning to be

Careful to underscore its finding that Turner had not been careful and ended up being in the wrong place at the wrong time.

Under the abuse of discretion standard, one who seeks reversal of a trial court's decision "must demonstrate that the trial court's decision was irrational or arbitrary. It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions." (*People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.) While reasonable people might disagree about whether to strike Turner's prior conviction, the record here does not show the trial court acted arbitrarily or irrationally when it declined to do so. Therefore, the trial court did not abuse its discretion.

### III. Probation Report Fee

The probation report recommended that Tucker be ordered to pay an administration fee of \$50 for preparation of the probation report "pursuant to County Ordinance 28403." The trial court later ordered Tucker to pay \$50 for preparation of the probation report, with the court minutes citing "County Ordinance 28403." Tucker contends the cited ordinance pertains to the costs of adult electronic application and monitoring and does not apply to him. Relying on *People v. Montano* (1992) 6 Cal.App.4th 118, he also asserts the trial court erred when it imposed a \$50 fee because the trial court denied probation. (*Id.* at p. 123.)

Tucker's reliance on *People v. Montano* is misplaced as the opinion is based on an earlier version of section 1203.1b that addressed cases in which the defendant was "'convicted of an offense and granted probation.'" (*People v. Orozco* (2011) 199 Cal.App.4th 189, 191.) In 1993, section 1203.1b, subdivision (a), was amended to apply

*"whether or not probation supervision is ordered by the court . . . ." (Ibid.)*

Accordingly, the trial court properly ordered Tucker to pay the cost of preparation of the probation report under the current version of section 1203.1b. Because the Penal Code authorized the fee, we need not address the trial court's reliance on a county ordinance.

DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

HALLER, Acting P. J.

McDONALD, J.