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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DIRIKI A. HILL,

Defendant and Appellant.

D059846

(Super. Ct. No. SCD231013)

APPEAL from a judgment of the Superior Court of San Diego County, Joseph P. Brannigan, Judge. Affirmed.

A jury convicted defendant Diriki Hill of one count of assault with a deadly weapon (Pen. Code,¹ § 245, subd. (a)(1), count 1), and found true the special allegation he personally used a knife in committing the assault (§ 1192.7, subd. (c)(23)). Hill pleaded guilty to two other counts and stipulated he had suffered three prior convictions that qualified as serious felonies and as strikes under the three strikes law. The court,

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

after denying Hill's motion to dismiss the prior conviction allegations, sentenced him to 25 years to life plus a determinate term of five years.

On appeal, Hill contends the court abused its discretion when it denied his effort to impeach a prosecution witness with that witness's prior convictions. Hill also contends the court abused its discretion when it denied his motion to dismiss the prior conviction allegations.

I

FACTS

A. Prosecution Evidence

Ms. Harvey had two children, including a one-year-old daughter fathered by Mr. Wilson, the victim of the charged assault. Although Harvey and Wilson were no longer romantically involved, their relationship remained amicable and they shared the parenting of their daughter.

In November 2010, Hill and Harvey were in a dating relationship. Harvey and her children lived on Beverly Street in San Diego, and Hill stayed a couple of nights a week with her.

On the afternoon of November 28, 2010, Wilson called Harvey to tell her that he was on his way to her residence to deliver some dog food. When she answered the phone, Wilson heard scuffling and heard Harvey say "he's beating me up."² When he

² At trial, Harvey denied she told Wilson during a phone conversation that Hill was beating her up, even though her phone records showed an 18-second phone call between

arrived, the front door was open but the security screen was locked, so Wilson knocked. Harvey started to leave the bedroom to answer, but (according to Harvey's statement to police when her car was stopped less than 15 minutes later) Hill hit her in the face and knocked her against a wall.³ Hill went to the door, opened it, and Wilson gave the dog food to Hill. Wilson asked about Harvey's whereabouts and Hill told him she was in the bedroom. Wilson could not see Harvey but could hear her crying.

Wilson called out to ask if Harvey was all right, and Hill told him, "I'll kill you," then headed back toward the bedroom. Wilson followed him and saw Hill and Harvey struggling over a large, sword-like knife. After Hill gained control of the knife, he moved toward Wilson with the knife and said, "I'm going to get you, motherfucker." Wilson ran out the front door and got into his car. He drove a short distance and called 911.

Wilson could still see the residence and, as he was talking to the 911 dispatcher, Hill, still carrying the knife, emerged from the house with Harvey. Hill and Harvey got into a car and drove away. Wilson gave the license plate to the 911 dispatcher.

Wilson's cell phone and hers at 3:41 p.m. Less than 10 minutes elapsed between this phone record and Wilson's call to the 911 dispatcher.

³ At trial, Harvey claimed she tripped on a table and hit her head as she went to answer the door when Wilson arrived. She did not recall telling police Hill punched her.

Harvey told police that, while she drove, Hill punched her in the right eye. He also threatened to kill her if she reported his assault on her. He warned her that his family would come after her if Hill was jailed because of her.⁴

Just minutes after Wilson called 911, police saw Harvey's car and stopped it. Police found Harvey crying and her hand was bleeding. Police arrested Hill and noticed he had blood droplets on his shoes. Police searched the car and found a sword-like knife.

B. Defense Evidence

Two of Hill's friends, Mr. Pena and Mr. Hoerle, testified to a previous confrontation between Hill and Wilson. Shortly after Thanksgiving, Hill and his two friends were at Harvey's house when Wilson arrived to pick up his daughter. Harvey and Wilson appeared to have an argument in the driveway that concluded when Harvey brought the girl out and turned her over to Wilson. Pena testified Wilson then angrily pointed at Hill and said, "I'm going to get you." Hoerle testified Wilson started to walk angrily toward Hill, saying something to the effect of "what are you going to do?" before returning to his car and driving away. The defense also introduced the testimony of its investigator that he went to interview Wilson three times, and left his card when Wilson was not home, but never received a return call.

⁴ At trial, Harvey denied Hill punched her in the car or threatened to harm her or her family if she did not keep her "mouth shut."

II

ANALYSIS

A. The Evidentiary Ruling

Prior to trial, the prosecution moved in limine to preclude the defense from impeaching Wilson with his prior felony convictions for drug-related offenses. The court granted the prosecution's motion, and Hill contends this was reversible error.

Background

The prosecution's in limine motion noted Wilson had four felony convictions for drug-related offenses, the dates of which were 1990, 1998, and 2000. The convictions were (1) a 1990 conviction for violating Health and Safety Code section 11359, (2) a 1998 conviction for violating Health and Safety Code section 11359, and (3) convictions in 2000 for violating Health and Safety Code sections 11352 and 11377. The defense argued these should be admitted into evidence so the jury would get "the full flavor of Mr. Wilson" because Wilson was the "key witness" against Hill and that avenues of impeachment of key witnesses should be open. The prosecution argued the court should exclude any mention of those offenses because some were not crimes involving moral turpitude, the crimes that arguably involved moral turpitude were too remote, and the events giving rise to the assault charge did not involve drugs.

The court, applying the framework created by *People v. Castro* (1985) 38 Cal.3d 301 (*Castro*), ruled the two convictions for Health and Safety Code section 11359 did involve moral turpitude, but the convictions for violating Health and Safety Code

sections 11352 and 11377 were "simple possession offenses, rather than possession for sale, which are not crimes of moral turpitude." The court, after considering Wilson's record, held the convictions were too remote, and were collateral because there was no suggestion drugs played any role in the charged offenses, and therefore ruled the prejudicial effect would outweigh any probative value the convictions might have, and barred the defense from using the convictions to impeach Wilson's credibility.

Legal Standards

In *Castro, supra*, 38 Cal.3d 301 at page 306, our Supreme Court concluded only prior convictions for crimes involving moral turpitude were admissible to impeach a witness's credibility. Moreover, *Castro* confirmed a trial court retained its discretion under Evidence Code section 352 to exclude evidence of prior convictions if the prejudicial impact of the evidence outweighed its probative value. (*Castro*, at p. 306.) The court established a two-pronged test for admissibility of prior convictions to impeach a witness's credibility. Initially, the trial court must determine whether the felony conviction necessarily involves moral turpitude. (*Id.* at p. 314.) The court equated moral turpitude with a readiness to do evil, reasoning a crime involving moral turpitude has some bearing on credibility. (*Ibid.*) By so holding, *Castro* broadened the class of prior felonies prima facie admissible for impeachment from those including only dishonesty to felonies involving moral turpitude.

If it is determined the felony conviction necessarily involves moral turpitude, the court must then weigh the probative value of the prior conviction against its prejudicial

effect under Evidence Code section 352. (*Castro, supra*, 38 Cal.3d at pp. 316-317.)

"When the witness subject to impeachment is not the defendant, those factors [that show the probative value of the prior conviction] prominently include whether the conviction (1) reflects on honesty and (2) is near in time." (*People v. Clair* (1992) 2 Cal.4th 629, 654.) Against these factors, the trial court weighs "undue consumption of time," and the "substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

Our review of the trial court's ruling on this issue is limited. "The rule is settled that the trial court's discretion to exclude or admit relevant evidence under Evidence Code section 352 'is as broad as necessary to deal with the great variety of factual situations in which the issue arises, and in most instances the appellate courts will uphold its exercise whether the conviction is admitted or excluded.' [Quoting *People v. Collins* (1986) 42 Cal.3d 378, 389.] [¶] . . . [¶] . . . '[W]hen the question on appeal is whether the trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge. [Citation.] A trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. [Citation.]" [Quoting *People v. Stewart* (1985) 171 Cal.App.3d 59, 65.]" (*People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1532-1533.)

Analysis

Hill argues the court abused its discretion when it held Wilson's 1990 and 1998 convictions were inadmissible under Evidence Code section 352 because of the remoteness of the convictions.⁵ We do not conclude the court exceeded the bounds of reason, all of the circumstances being considered. The passage of time between the convictions and the date of trial was extensive, ranging from 11 years (for the most recent of the convictions) to over 20 years (for the most remote of the convictions). Although there is no "consensus among courts as to how remote a conviction must be before it is too remote" (*People v. Burns* (1987) 189 Cal.App.3d 734, 738), the use of a 10-year period as a presumptive cut-off date for prior convictions is within the court's discretion

⁵ Hill also asserts the trial court erred when it found the 2000 conviction for violating Health and Safety Code section 11352 was not a crime of moral turpitude and, based thereon, excluded use of that conviction. There is one case, *People v. Navarez* (1985) 169 Cal.App.3d 936, that examined whether a conviction for "transportation/sale of heroin (Health & Saf. Code, § 11352) does or does not involve moral turpitude. . . . *Castro* . . . holds that while simple possession of heroin does not necessarily involve moral turpitude, possession for sale does pass the test." (*Id.* at p. 949.) The *Navarez* court concluded "transportation/sale of heroin" was a crime of moral turpitude. (*Ibid.*) However, Hill never asserted below that Wilson's conviction for violating Health and Safety Code section 11352 was a crime of moral turpitude, or that the trial court's characterization of the offense as "simple possession offense[], rather than possession for sale, which [is] not [a] crime of moral turpitude," was incorrect. Under these circumstances, Hill did not preserve the issue for appeal because he did not object to the ruling on these grounds at trial. (*People v. Carrera* (1989) 49 Cal.3d 291, 324 [where defendant contested evidentiary ruling below on one theory and did not raise second argument, defendant may not claim on appeal that evidentiary ruling was error based on latter theory].) Moreover, even assuming Hill had preserved the argument by pointing out the *Navarez* authority in the trial court, Hill provides no argument that convinces us the trial court would have treated the 2000 conviction differently from its analysis of the 1998 conviction. To the extent Hill may raise any claim of error as to exclusion of the 2000 conviction, we assess that claim on appeal as though the court's Evidence Code section 352 analysis included all three convictions.

(*People v. Pitts* (1990) 223 Cal.App.3d 1547, 1554), and all of Wilson's prior offenses were of a more ancient vintage. Moreover, the courts have repeatedly recognized that crimes involving a general readiness to do evil are less indicative of a witness's veracity in testifying than crimes of dishonesty (see, e.g., *People v. Thornton* (1992) 3 Cal.App.4th 419, 422; *People v. Coad* (1986) 181 Cal.App.3d 1094, 1106), and the crimes considered below (although involving moral turpitude because of a general readiness to do evil) were not crimes involving dishonesty.

Because the convictions were remote, did not involve dishonesty, and involved criminal conduct irrelevant to the factual milieu of the charged offense, we do not conclude the court exceeded the bounds of reason, all of the circumstances being considered, when it barred the defense from using those old convictions to impeach Wilson's credibility.

B. The Sentencing Decision

Hill contends the trial court erred when it declined to dismiss two of his prior strike allegations because it based its refusal to dismiss on facts unsupported by the record.

Background

After the jury convicted Hill of the charged assault, the parties stipulated he had pleaded guilty in 1996 to three separate felonies (one count of voluntary manslaughter and two counts of assault with a firearm) and had admitted a former Penal Code section 12022, subdivision (a)(1), allegation in connection with the voluntary manslaughter

charge (the 1994 offenses), all of which were alleged in the present proceeding to be strike convictions within the meaning of the three strikes law. At sentencing, Hill moved to dismiss two of the prior strike allegations under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, arguing that he was a passive participant in the crimes because it was a drive-by shooting in which he merely rode in the car with the actual shooter. The prosecution argued there was evidence that it was Hill's idea to confront the victims, he gathered the attackers to go to the site of the shooting, and knew his companions would be taking guns with them to the confrontation. The prosecutor also argued that, after Hill was released from 14 years in prison for that offense, he did not mend his ways but instead continued to employ violence in his relationships with others, including a demonstrable willingness to use weapons in these confrontations.

After considering Hill's arguments, as well as the arguments in opposition by the prosecution, the court denied the motion. The court noted that, as to the present offense, the prosecutor "goes through the factors in aggravation and talks about the fact that the crime involved violence, use of a weapon, was engaged in violent conduct." The court also noted the prosecution "points out [Hill's] prior conviction as an adult, and as a juvenile the proceedings are numerous with increasing seriousness, points to the prior prison term, the fact that [Hill's] performance on probation and parole was unsatisfactory, and then [the prosecution] argues . . . [Hill] clearly falls within the spirit of the three strikes legislation and I agree as well [¶] So I'm going to deny the request to strike the strikes"

General Legal Principles

In *Romero*, our Supreme Court held section 1385, subdivision (a), permits a court acting on its own motion to dismiss prior felony conviction allegations in cases brought under the three strikes law. (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at pp. 529-530.) *Romero* emphasized that "[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.) Although the Legislature has not defined the phrase "in furtherance of justice" contained in section 1385, subdivision (a), *Romero* held this language requires a court to consider both the constitutional rights of the defendant and the interests of society represented by the People in determining whether to dismiss a prior felony conviction allegation. (*Romero*, at p. 530.)

In *People v. Williams* (1998) 17 Cal.4th 148, 161, our Supreme Court further defined the standard for dismissing a strike "in furtherance of justice" by requiring that the defendant be deemed "outside" the "spirit" of the three strikes law before a strike allegations is dismissed: "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to . . . section 1385[, subdivision] (a), or in reviewing such a ruling, 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 had not previously been convicted of one or more serious and/or violent felonies."

A trial court's decision not to dismiss a prior conviction allegation under section 1385 is reviewed under "the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 371.) *Carmony* explained that when reviewing a decision under that standard, an appellate court is guided "by two fundamental precepts. First, '[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a 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.'" [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 376-377.)

Analysis

We conclude Hill has not satisfied his "burden . . . to clearly show that the sentencing decision was irrational or arbitrary." (*People v. Carmony, supra*, 33 Cal.4th at p. 376.) The court considered the nature of the current offense, which involved a threat

of violence and the use of a weapon, both proper grounds upon which to deny a *Romero* motion. (*People v. Williams, supra*, 17 Cal.4th at 161; cf. *People v. Pearson* (2008) 165 Cal.App.4th 740, 749.) The court also properly relied on Hill's criminal history (which involved numerous offenses of escalating severity until he was imprisoned for the 1994 offenses), and his demonstrated inability to comply with probation and parole conditions,⁶ when it found he "clearly falls within the spirit of the three strikes legislation" and denied his *Romero* motion.

The only basis for Hill's argument that the denial of the *Romero* motion was an abuse of discretion is that the court made an "implicit finding" Hill was a direct participant in the 1994 offenses, despite the evidence that he was merely accompanying the actual shooter and had no foreknowledge of the shooter's intentions. However, the record does not suggest the court *made* that finding as to the 1994 offenses, or that it *relied* on that finding as the basis for rejecting his *Romero* motion. Instead, Hill's argument rests on the premise that we should *infer* the trial court's ruling was based on that finding. However, we do not presume error from a silent record, but instead require an affirmative showing of error. (*People v. Davis* (1996) 50 Cal.App.4th 168, 172.) Hill

⁶ While on parole for the 1994 offenses Hill was twice returned to custody for violating his parole, including one incident in which he was arrested for being in possession of a firearm. At the time of his 1994 offenses, he was an escapee from a Youth Authority halfway house. Additionally, the probation report indicated that in 2010, after he was released from prison, Hill was arrested for an incident involving domestic violence in which he was struggling with his domestic partner over a knife, and then suffered a second arrest when he violated a restraining order to stay away from the domestic partner.

has not made that showing and therefore has not satisfied his burden of clearly showing the sentencing decision was irrational or arbitrary.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.