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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN LESLIE DAVIS,

Defendant and Appellant.

D060030

(Super. Ct. No. SCN272865)

APPEAL from a judgment of the Superior Court of San Diego County, Aaron H. Katz, Judge. Affirmed.

John Davis appeals from a judgment convicting him of robbery. He contends there is insufficient evidence to support the jury's finding that he was the robber because the DNA evidence presented by the prosecution lacked probative value. We reject this contention. As to sentencing, he argues the trial court erred in denying his request to dismiss all but one of his strike priors. The record does not show an abuse of discretion in this ruling. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On the morning of October 21, 2009, a jewelry store in Carlsbad was robbed by a masked intruder who entered the premises through the roof. When employees Gaylene Taylor and Mary Hyde arrived at the store a little after 9:00 a.m., there were no signs of forced entry and everything appeared normal. They engaged in their usual procedures for opening the store. They walked into the store together and retrieved the panic buttons that they wear to summon the police if someone is in the store. Taylor "cleared" the store by inspecting the various rooms inside the store to make sure no one was there, while Hyde waited by the front door so she could summon assistance in the event of an intruder. Once the store was cleared, they turned off the alarm and locked the doors so they could prepare the store for opening. They opened the safe and started setting out the jewelry.

At about 9:15 a.m., while Taylor was placing jewelry to be cleaned in the steam room in back of the store, she turned around and was confronted by a masked man with a gun pointed at her. The man grabbed Taylor's arm to pull her to the front of the store, stating " '[c]ome.' " Taylor did not want to go to the front of the store because Hyde was there. She started screaming, yanked away from the man, and dropped flat on the floor. She screamed at the man to take whatever he wanted but just not to hurt them. The man had "just appeared from nowhere" and Taylor could not understand where he had come from.

Hyde heard Taylor screaming. As Hyde ran towards the back of the store, the robber came towards her with the gun pointed at her and said, " 'Get down. Get down on

the floor, Ma'am.' " Hyde dropped to the floor. The man went to the safe, took a large bucket of jewelry, and left the store.

The evidence showed that the robber entered and exited the store through the ceiling of the women's bathroom. The bathroom sink was broken off from the vanity; the vanity was broken; and there was jewelry on the bathroom floor. Above the broken vanity, an attic hatch leading to a crawlspace had been removed, and above the crawlspace there was a hole cut in the roof. There were jewelry display holders strewn about on the roof. Inside the crawlspace, the police found a black paintball-type mask, a black gun (which turned out to be an airsoft pistol), a backpack, and a bin containing jewelry. The wiring on a motion sensor in the crawlspace that triggers the alarm had been disconnected. There was also evidence that the robber had been on the premises before the date of the robbery. For example, the employees recalled that two days before the robbery, they noticed ceiling dust on the printer and small holes in the ceiling in the store's back office (where the safe was located). The wholesale value of the jewelry stolen from the store was \$84,723.

Taylor and Hyde could not see the robber's skin color because he was completely covered, including a mask and gloves. They told the police that they thought he was Hispanic because of his accent.¹ At trial, they testified that he spoke to them in English and they described his voice as "very gentle . . . and . . . respectful" and "very soft."

¹ Davis is African-American. During a 1993 interview with the police, he said that he could speak Spanish.

In January 2010, a database search showed a match between Davis's DNA profile and the major DNA profiles on the mask and airsoft pistol found in the crawlspace.² A DNA expert testified that the probability that a person randomly selected from the African-American population would have this same DNA profile was 1 in 85 quintillion. The expert explained that when performing a DNA analysis, she calculates DNA frequency estimates for the three major population groups: Caucasian, African-American, and Hispanic. When asked why only three major population groups are used, she explained that there is "some variation in DNA frequencies from one population to another, but the variations are really not very significant." However, she performs the calculations for all three groups because this is the general practice for criminalists, and to show "there is variation, but it's really not a huge amount of variation."

During their investigation, the police discovered that on November 12, 2009 (about three weeks after the robbery), Davis pawned a loose diamond at a pawn shop in Vista that buys, sells, and makes loans on diamond jewelry. The pawn shop jeweler testified the diamond was a rare, high quality, half-carat, marquis-shaped stone.³ One of

² During the initial investigation of the case, the police had received information about Hispanic males acting suspiciously near the jewelry store. At about 9:00 p.m. the night before the robbery, a man working at a business next door to the jewelry store saw two Hispanic men in the area that gave him "a creepy feeling." Moments after the robbery, city employees working in the neighborhood saw two Hispanic males walking in the alley behind the jewelry store; they were carrying backpacks, looking over their shoulders, and attempting to hide behind trees. However, the police did not receive any further information which allowed them to pursue an investigation of these individuals.

³ Davis obtained a \$175 loan for the diamond, which was about 10 percent of its value.

the rings stolen from the jewelry store had two half-carat, marquis-shaped diamonds that were the same high-quality grade as the one pawned by Davis.

In February 2010, Davis was arrested near his residence in Oceanside. When the police searched the vehicle he was driving, one of the items they found was a headband flashlight.

Davis's Prior Rooftop Entry Offenses

To support its case against Davis, the prosecution submitted evidence of three prior burglaries or robberies in Oceanside committed by Davis in February and March 1993, during which he used the "unique modus operandi" of rooftop entry. On February 15, he robbed an automobile parts store; on March 1 he burglarized a gun store; and on March 8 he robbed a check-cashing store. To accomplish these crimes, he cased the business premises prior to the crime; he made a hole in the rooftop; and he or his accomplices entered the crawlspace and then entered the store. During the robberies, he evaded the alarm systems, waited for the employees to arrive to open the stores, and then confronted the employees with an airsoft gun.⁴ When he was interviewed by the police for these offenses, he said that he had a background in construction where he performed the layout for the framing of buildings and he became familiar with security systems.

A Carlsbad police officer with 20 years of experience as a field evidence technician testified that the October 2009 jewelry store robbery was the first one he had

⁴ In the burglary offense, Davis made the hole in the roof and his accomplices then entered the store through the hole.

seen where the robber succeeded in gaining access through the roof. A retired Oceanside police officer with 21 years of experience testified that rooftop-entry robberies are not common, and the modus operandi used by Davis in 1993 was "very unique."⁵

Defense Witnesses

Davis's girlfriend (Socorro Hernandez) and his former employer (Derrick Pregler) testified on behalf of the defense. Hernandez and Davis were living together in a home they were buying, and Hernandez never saw Davis with jewelry, money, expensive items, or other matters that could link him to a jewelry store robbery. Pregler testified that Davis was a certified mechanic for boat repair; he had worked for Pregler's boat repair company; and the quality of his work was excellent. Davis used a headband flashlight so that he could work hands-free on boat repairs. Hernandez and Pregler described an arm injury suffered by Davis in 2008 or 2009 while bicycle riding that (according to Hernandez) caused him to have less strength in that arm. However, they acknowledged the injury did not lessen his ability to perform physical labor such as remodeling his bathroom and climbing and carrying tools for repairing boats.

In June 2009 Davis was laid off from the boat repair job because of the economy. Davis and Pregler remained in contact after his layoff and Pregler helped him get side jobs. Like Hernandez, Pregler never observed Davis with a large amount of jewelry and Davis did not say or do anything that could suggest he had robbed a jewelry store.

⁵ On cross-examination, the officer testified that rooftop entry for commercial burglaries was "a little bit more common," but it was uncommon for commercial robberies.

Jury's Verdict and Sentence

The jury found Davis guilty of two counts of robbery against victims Taylor and Hyde. Davis admitted that he had incurred six strike prior convictions. He was sentenced to two consecutive terms of 25 years to life.

DISCUSSION

I. *Sufficiency of the Evidence of Identity*

Davis asserts the record does not support the jury's finding that he was the perpetrator of the robbery because the DNA evidence lacked probative value, and there was no other persuasive evidence linking him to the crime. To support his challenge to the DNA evidence, Davis asserts that the prosecution's DNA statistical evidence only showed the rarity of the DNA profile in the *African-American population*, whereas it failed to present statistical evidence showing the rarity of the profile in the *general population*. He contends that because the racial identity of the perpetrator was unknown, the population of possible perpetrators was not limited to African-Americans, and absent evidence as to the frequency of the profile in the two other major population groups (Caucasian and Hispanic) the DNA evidence lacked any evidentiary force.

To support his position, Davis relies on the California Supreme Court's analysis and holding in *People v. Wilson* (2006) 38 Cal.4th 1237 (*Wilson*). The *Wilson* court explained that DNA analysis involves determining whether there is a match between the suspect's DNA profile and the crime-scene DNA and, if so, calculating through statistical analysis the probability that a person other than the suspect, randomly selected from the relevant population, will have this same profile. (*Id.* at pp. 1240, 1242, 1245.) Because

profile frequencies between the different racial and ethnic groups vary, separate frequency calculations are made for different population groups to increase the accuracy of the estimates of profile frequency. (*Id.* at pp. 1239-1240, 1242, 1247.) The *Wilson* court rejected the defendant's argument that if the race or ethnicity of the perpetrator is unknown, statistical probability evidence regarding any particular population group is irrelevant. (*Id.* at pp. 1240, 1242-1245.) Instead, *Wilson* concluded that even when the perpetrator's race or ethnicity is unknown, it is proper to present the jury with a range of frequencies based on the three most common population groups in the United States (Caucasian, African-American, and Hispanic) because this evidence is relevant to show the rarity of the profile; i.e., that "most persons of at least major portions of the general population could not have left the evidence samples." (*Id.* at pp. 1242-1245.)

In its analysis, the *Wilson* court observed that to determine the odds of a DNA match for someone other than the perpetrator, the relevant population group that should be statistically evaluated is the group to which the *perpetrator* belongs or might belong. (*Wilson, supra*, 38 Cal.4th at pp. 1243, 1245.) Thus, for example, if the perpetrator is known to be Caucasian, it is proper to present the jury with frequency data only for Caucasians. (*Id.* at pp. 1245, 1249; accord, *People v. Geier* (2007) 41 Cal.4th 555, 611.) In contrast, if the perpetrator's race or ethnicity is unknown or uncertain, the jury should

be presented with a range of frequency data from the major population groups to which the perpetrator might belong. (*Wilson, supra*, at pp. 1242-1245, 1249.)⁶

In reaching its conclusions, the *Wilson* court disapproved the holding in *People v. Pizarro* (2003) 110 Cal.App.4th 530 that no frequency evidence should be admitted absent evidence showing the perpetrator's race or ethnicity. (*Wilson, supra*, 38 Cal.4th at pp. 1244, 1250-1251.) However, *Wilson* affirmed *Pizarro*'s conclusion that frequency evidence should *not* be confined *solely* to the defendant's population group when the perpetrator's race or ethnicity is unknown. (*Wilson, supra*, at pp. 1243, 1250-1251.) *Wilson* explained that when the perpetrator's racial or ethnic identity is unknown, presentation of the rarity statistics only for the defendant's population group could suggest to the jury, without an evidentiary basis, " 'that the race [or ethnicity] of the perpetrator is the same as the race [or ethnicity] of the defendant.' " (*Wilson, supra*, 38 Cal.4th at pp. 1243, 1247, 1250; see *People v. Geier, supra*, 41 Cal.4th at pp. 609-610 [defendant could properly object that population frequency evidence based solely on defendant's race or ethnicity was "unfairly skewed" to defendant's detriment because it might improperly suggest to jury that perpetrator was member of defendant's race or ethnic group].)

⁶ The *Wilson* court rejected the contention that the prosecution was required to present frequency evidence for *all* possible groups to which the perpetrator could belong (for example Asians and Native Americans), rather than just the three most common population groups. (*Wilson, supra*, 38 Cal.4th at p. 1249.) The court reasoned that although "giving results for all possible groups would be permissible, doing so is not required to give relevance to the range of possibilities." (*Id.* at p. 1250.)

Notwithstanding this directive in *Wilson*, we are not persuaded by Davis's contention that frequency evidence based solely on the defendant's population group necessarily loses all probative value if it is not coupled with probability evidence for a larger class of possible perpetrators. *Wilson* stands for the proposition that even when the race or ethnicity of the perpetrator is unknown, evidence showing the range of profile frequencies based on the major population groups is relevant because these groups represent a large portion of the general population, and hence the evidence sheds light on the rarity of the profile and the odds that there could be a DNA match for someone other than the defendant. Profile frequency evidence solely for African-Americans does not, standing alone, present the jury with a complete picture of the relevant population because African-Americans are only one of the three major population groups. However, this does not mean the evidence loses *all* probative value concerning the rarity of the DNA match. Because African-Americans are a *major* population group, evidence showing that there is an exceedingly low probability of a DNA match with another African-American carries significant probative value on the issue of whether the prosecution has proven that the defendant is the perpetrator. The fact that frequency evidence for *all three* major population groups has *greater* probative value than frequency evidence for *only one* of the three major groups, does not mean the latter has no evidentiary force to support a jury's verdict.

In short, the reason *Wilson* directs the courts not to confine the probability evidence to the defendant's own group is not because the latter evidence is necessarily of no probative value, but rather because it could mislead the jury to infer, without

evidentiary support, that the perpetrator is the same race or ethnicity as the defendant. Here, if defense counsel had objected to the frequency evidence solely for African-Americans, it would have been proper for the trial court to condition admission of the evidence on the presentation of data concerning all three major population groups. However, the failure to present the frequency evidence for all three groups did not entirely obviate the probative value of the data concerning one of these major population groups.

Turning to the sufficiency of the evidence of identity in its totality, we examine the entire record in the light most favorable to the judgment, and presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence, to determine if a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Smith* (2005) 37 Cal.4th 733, 738-739.) The record supports the jury's finding that Davis was the robber. The frequency data showing that there was a 1 in 85 quintillion chance of a DNA match with an African-American supported that no other African-American was the perpetrator. Although the expert did not present the frequency data for the other two major population groups (Caucasian and Hispanic), she testified that she performs these additional calculations when she conducts her DNA analysis, and the variations between the groups are not large. From this testimony, the jury could reasonably infer that, in accordance with the expert's standard practice, in this case she calculated the profile frequencies for all three major population groups, and her results showed that the odds of a DNA match with a person from the other two major population groups was, as with the African-American population,

extremely low. (See *People v. Cua* (2011) 191 Cal.App.4th 582, 596, 601 [DNA expert's uncontradicted testimony that crime-scene stain " 'belonged to' " defendant supported inference that rarity statistics would support this conclusion even though expert was not asked about rarity statistics]; *People v. Pizarro, supra*, 110 Cal.App.4th at p. 630 [" 'There are good reasons to assume that under ethnic heterogeneity the suspect's profile is more frequent in his own population than in many (if not most) others' "].) The jury could also consider that if the rarity statistics for the other two major population groups were significantly more favorable to Davis than the African-American rarity statistic, the defense would likely have presented this evidence to rebut the statistical evidence presented by the prosecution. (See *People v. Brady* (2010) 50 Cal.4th 547, 566 [jury may consider defense failure to introduce available material evidence to refute prosecution case]; see also *Wilson, supra*, 38 Cal.4th at p. 1250; *People v. Cua, supra*, 191 Cal.App.4th at p. 601.)

Additionally, Davis was tied to the robbery by virtue of the rare, high-quality diamond he pawned at a pawn shop that matched the characteristics of the diamonds in a ring that was stolen from the store. He was also found in a possession of a headband flashlight, which the jury could infer was a useful tool on a roof-top at night and/or in a dark crawlspace. Further, the evidence showed that in 1993 Davis had committed three robbery or burglary offenses for which the means of entry was a hole in the roof, which was the same highly distinctive modus operandi used by the robber in the current offense. Although these prior offenses occurred 16 years before the current offense, the fact that

all the offenses involved the same relatively sophisticated means of entry supported an inference that Davis engaged in the behavior that comprised the charged offense.

Based on the evidence concerning the DNA match, the possession of the diamond and headband flashlight, and the commission of numerous offenses involving a highly distinctive modus operandi, there is sufficient evidence to support the jury's finding that Davis was the robber beyond a reasonable doubt. Other evidentiary factors cited by Davis to defeat the jury's verdict (i.e., that he was not seen at the store before or after the robbery, and that the victims initially described the robber as having a Hispanic accent) were relevant for the jury to consider, but they do not compel a finding contrary to the jury's verdict.

II. *Refusal to Dismiss Strike Prior Convictions*

Davis argues the trial court erred in refusing his request that it dismiss all but one of his strike prior convictions.

The purpose of the Three Strikes law is to protect the public from recidivist offenders by imposing extended punishment on offenders who have previously committed violent or serious felonies and who again commit a felony. (*People v. Strong* (2001) 87 Cal.App.4th 328, 337; *People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1329-1330.) "[T]he three strikes law . . . establishes a sentencing norm, [and] carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. . . . [T]he law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*People v. Carmony* (2004) 33 Cal.4th 367, 378 (*Carmony*)). However, a trial court may

dismiss a strike prior conviction if, in light of the nature and circumstances of the current and prior felony convictions and the particulars of the defendant's background, character, and prospects, the defendant is deemed outside the spirit of the Three Strikes law in whole or in part. (*Id.* at p. 377.)

On appeal, we review the trial court's decision for abuse of discretion. (*Carmony, supra*, 33 Cal.4th at p. 374.) The burden is on the defendant to clearly show that the sentencing decision was "so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 376-377.) The 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. (*Id.* at p. 377.) Rather, the court's ruling is an abuse of discretion only in an "extraordinary case" when the "relevant factors . . . manifestly support the striking of a prior conviction and no reasonable minds could differ" (*Id.* at p. 378.)

The record includes the following information about Davis's criminal background. Between 1980 and 1982, he committed numerous offenses, including theft, burglary, arson and robbery. During several of the burglaries in this time period, Davis entered a commercial establishment through the ceiling. The arson (a strike offense) occurred on August 8, 1982, when he threw two "Molotov Cocktails" into an apartment occupied by his ex-wife, which started a fire in the bedroom where his small son was sleeping. On August 24, 1982, he committed a home invasion robbery; he and an accomplice entered a home, pointed a gun at the occupants, and stole property totaling over \$7,000, including an automobile. For this home invasion offense, he was convicted of two strike offenses

(robbery and assault with a firearm), plus grand theft and two counts of burglary. He received a seven-year prison sentence for the arson incident; a four-year four-month sentence for the home invasion incident; and a two-year sentence due to violation of probation for a 1981 grand theft offense.

After his release from prison, in 1993 he committed a series of robbery and burglary offenses, incurring three additional strike offenses for robbery. As described at trial, on three occasions in Oceanside in February and March 1993 he committed a rooftop-entry commercial robbery or burglary. During the robberies he confronted employees with a fake gun, and in one robbery he tied the victim's hands behind her back. Also in March 1993, he committed a robbery in Orange County, during which he and two accomplices robbed a jewelry store and confronted the employees with a gun. For the Orange County incident, he was convicted of robbery and burglary and received a 16-year sentence. For the Oceanside offenses, he pled guilty to two robberies and received a two-year prison sentence.

Davis was apparently released from prison in about 2000, and he thereafter successfully completed parole. In October 2009, he committed the charged robberies.

At sentencing, Davis requested that the court dismiss all but one of his strike priors. In support, he noted that during the current offense he used a fake gun and no physical harm was inflicted on the victims. Further, his last strike offense was in 1993; he had been law abiding for almost a decade since his release from prison; at trial his former employer attested to his good character; and a prison term under the one-strike scheme would still be severe.

In opposition, the prosecutor contended that Davis continued to commit serious felonies notwithstanding his extensive prison terms; he had engaged in a repetitive pattern of committing robbery; and he did not hesitate to confront his victims and to use accomplices and weapons. The prosecutor urged the court to consider the fact that his priors were extremely dangerous, including a home invasion robbery where he held the victims at gunpoint; an attempt to burn down his ex-wife's home which could have killed his young son; and a robbery of jewelry store employees at gunpoint. Further, his current offense involved sophistication and planning and inflicted a great amount of trauma on the victims.

The victims of the current robbery submitted statements at sentencing describing the traumatic impact of the crime and urging the court to give Davis the maximum possible sentence. Taylor said that the day of the crime was the "worst day of [her] life" and it had "changed [her] life forever"; she had never experienced such "terror and vulnerability"; and the incident still caused her to struggle with "everyday living." Hyde stated that she had never "felt such terror in [her] life"; she felt "vulnerable and helpless"; Davis's use of the gun took away her "sense of safety and well being"; and she now experienced anxiety and fear on a daily basis. The victims described the terror they felt when they were confronted by the masked intruder after they had "cleared" the store and thought they were safe.

The trial court declined Davis's request to dismiss any of his strike priors, stating that it could not justify it "in any way, shape, or form" and there was "absolutely no justification to do it." The court stated that although his last prior offense was in 1993,

his record showed that he was a "career criminal" who was "incapable of not preying on the community." The court observed that although Davis used a toy gun in the current offense, the victims did not know this, and they will be impacted by the crime for the rest of their lives.

The record supports the trial court's decision. Davis's lengthy criminal history includes numerous robberies and burglaries, and it shows that he developed a means of entry through rooftops that he repeatedly used to commit his crimes. Although there was a hiatus in this criminal conduct for about nine years, he chose to reoffend after this time period, again using his roof-entry modus operandi. His decision to resurrect the type of crime he had repeatedly committed in the past supported the trial court's conclusion that he was a career criminal who had not reformed. Further, Davis's criminal history included conduct that created a particularly high risk of death or great bodily injury to his victims, including the use of real guns on two occasions and arson. The trial court could also consider the serious psychological trauma inflicted on the employees during the current offense, who thought they were safe in their place of employment when they were confronted by what appeared to be an armed robber who had gained access to the premises through the ceiling.

Davis asserts the trial court did not adequately consider various factors that brought him outside the spirit of the Three Strikes law, including the remoteness of his strike offenses; he had committed no other felonies since 1993; he had a steady employment history, owned a home and was in a stable relationship; and the current robbery did not involve the use of a real gun and the victims described the robber's tone

as gentle and respectful. Further, he contends the court did not consider that he would still face a lengthy sentence if the court dismissed all but one of his strike priors. None of these factors required the court to dismiss a strike prior, and there is nothing in the record to suggest that the court did not properly consider them when making its decision. The court stated that it had reviewed defense counsel's statement in mitigation, and defense counsel presented oral argument at the sentencing hearing. Absent an affirmative indication to the contrary, we presume the court considered all relevant factors when exercising its discretion concerning the strike priors. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

The record supports the court's finding that Davis was not outside the spirit of the Three Strikes law.

DISPOSITION

The judgment is affirmed.

HALLER, Acting P. J.

WE CONCUR:

AARON, J.

IRION, J.