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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID PATRICK ROMAN,

Defendant and Appellant.

E053068

(Super.Ct.No. FWV1001948)

OPINION

APPEAL from the Superior Court of San Bernardino County. Mary E. Fuller, Judge. Affirmed as modified, and remanded with directions.

Gail Ganaja, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant David Patrick Roman of being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1))<sup>1</sup> and destroying or concealing evidence (§ 135). The trial court sentenced defendant to five years in prison after it found true allegations that defendant had suffered a prior “strike” conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and a prior prison term (§ 667.5, subd. (b)). In this appeal, defendant argues the trial court abused its discretion when it declined to dismiss his strike prior and declined to sentence him to less than five years. Defendant also argues section 654 precludes him from being sentenced for destroying and concealing evidence. As discussed *post*, we affirm the judgment but order the sentence for destroying or concealing evidence stayed pursuant to section 654.

### **FACTS AND PROCEDURE**

On the afternoon of March 9, 2010, a motorcycle police officer attempted to pull over a truck being driven by Christopher Gurule. Gurule refused to pull over and a chase ensued. Another police officer who joined the chase saw Gurule talking on his cellular telephone. Gurule eventually pulled into a large apartment complex through the open gate.<sup>2</sup> Gurule threw a gun from his truck onto a walkway in the apartment complex. Defendant appeared, picked up the gun, looked at the motorcycle officer and

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> The officer testified that it was unusual for the gate to be open in the middle of the day, but could not say whether it closed automatically after the officer followed Gurule into the parking lot.

ran away. The motorcycle officer left his motorcycle and chased defendant on foot through the apartment complex. Defendant was eventually found in a friend's apartment wearing different clothes and with his mustache shaved off. The gun was never found.

In a second amended information filed January 31, 2011, the People charged defendant with being a felon in possession of a firearm, destroying or concealing evidence, and alleged he had a prior "strike" conviction and a prior prison term. A jury trial began that day. On February 1, 2011, outside the presence of the jury, the trial court found true the allegations regarding the strike prior and prison term prior. On February 4, 2011, the jury convicted defendant on both counts. On March 4, 2011, the trial court denied defendant's *Romero*<sup>3</sup> motion and sentenced him to the midterm of two years for the gun possession charge, doubled to four years for the strike prior, plus one year for the prison term prior.<sup>4</sup> The court also sentenced defendant to 50 days for the destroying or concealing evidence charge, with 50 days credit for time served. This appeal followed.

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<sup>3</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

<sup>4</sup> The trial court commented, "Mr. Roman, your record is horrendous. You have been given opportunity after opportunity and you have not taken any of them to heart and you find yourself in this situation before the court that you are now in. You obviously have family members that care very much about you, but you don't care enough about them to do what's right, and it's demonstrated over and over again through your history. So, I am not prepared to find that this case, or you as an individual, fall outside of the strike law, and I will not strike the strike allegation."

## DISCUSSION

### 1. *Abuse of Discretion in Sentencing*

After his conviction, defendant asked the court to exercise its discretion to strike his prior strike offense in the interest of justice (*Romero, supra*, 13 Cal.4th 497), arguing that he had merely picked up a gun thrown by another person, most of his prior convictions were misdemeanors committed between the ages of 18 and 21 (he was 28 years old at the time of this conviction), he was successful on parole from his single felony prior, he had a child and was expecting another, and had a supportive family. The trial court declined to dismiss the strike prior.

The appellate court reviews the refusal to dismiss strike priors under *Romero* for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) We find no abuse of discretion here.

A trial court may, in the furtherance of justice, dismiss or vacate an allegation under the three strikes law. (§ 1385, subd. (a); *Romero, supra*, 13 Cal.4th at pp. 508, 529-530.) When requested by the defendant, the court must consider the evidence offered in support of the defendant's contention that the dismissal of a strike would be in the furtherance of justice. (*People v. Carmony, supra*, 33 Cal.4th at pp. 375-376.) Among other things, the court should consider the nature and circumstances of the present felony, the nature and circumstances of the prior serious or violent convictions, and the defendant's background, character, and prospects, to determine whether he or she should be deemed within or without the spirit of the three strikes law. (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Here, defendant has numerous misdemeanor convictions dating back to 2001, including theft, petty theft, false identification to a police officer, drug possession, and driving with a suspended license. In each case he received probation and, in a few instances, very little jail time. He also has a felony conviction for making a criminal threat with intent to terrorize (§ 422) from 2004, for which he was originally given a five-year suspended sentence and placed on probation. Defendant violated probation and eventually served three years four months in state prison. Even since committing the crimes in the current matter, defendant has been twice convicted of driving with a suspended license and once of possessing marijuana. This record supports the trial court's conclusion that defendant does not fall outside the spirit of the three strikes law based on his criminal past.

Although, as defendant points out, it appears he successfully completed parole after his previous felony conviction (after failing on probation), he was on misdemeanor parole when he committed the current crimes. In addition, his arguments regarding his character and prospects are unavailing. Having the strong support of his family and being a father did not deter him from committing the current crimes, which involved concealing a handgun from the police, involving them in a foot chase, and changing his clothing and shaving his moustache in an attempt to avoid detection. Based on this record, we cannot say that the trial court abused its discretion when it declined to dismiss his prior strike.

Defendant makes a similar argument that, in the alternative, the trial court abused its discretion when it sentenced him to five years in prison instead of either

striking the prison term prior or imposing the low term of 16 months on the gun possession charge instead of the middle term. We reject this assertion for many of the same reasons. A trial court's sentencing decision is reviewed for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) General objectives of sentencing include the protection of society, punishment of the defendant, encouraging the defendant to lead a law-abiding life, deterring others from criminal conduct, and preventing the defendant from further criminal conduct by incarceration. (Cal. Rules of Court, rule 4.410(a).) Defendant describes himself as a follower who did not instigate this crime, but rather decided to help an associate when asked. We counter that defendant could have chosen to decline this request. In addition, defendant showed criminal sophistication when he went to extreme measures to evade the police officer who chased him on foot, and then later both changed his clothes and shaved his moustache in an attempt to avoid apprehension. Further, defendant's actions resulted in the gun never being recovered. Finally, the trial court rejected the recommendation of the probation department to impose the upper term of three years for the gun possession charge, which would have resulted in a total sentence of seven years. Based on defendant's criminal history, his lack of ability to lead a law-abiding life, the facts of the crime, and his poor performance on both misdemeanor and felony probation, the trial court did not abuse its discretion when it sentenced him to five years in prison.

## 2. Section 654

Defendant also argues the trial court erred when it failed to stay the sentence on the destroying or concealing evidence conviction because he had the same intent when he both possessed the firearm and concealed or destroyed it as evidence in a police investigation. The People do not address the merits of this argument, but rather assert that it is moot because the trial court sentenced defendant on the concealing or destroying evidence charge to 50 days in custody, with credit for 50 days already served, thus precluding any effective relief and making the claim moot under *People v. Travis* (2006) 139 Cal.App.4th 1271, 1280, because defendant already served the 50 days. We disagree that no effective relief is available. Should defendant prevail on his section 654 argument, the 50 days could be credited to time served on the five-year sentence that was also imposed.

Section 654, subdivision (a), provides in pertinent part: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” Section 654 precludes multiple punishments not only for a single act, but also for an indivisible course of conduct. (*People v. Hester* (2000) 22 Cal.4th 290, 294.) “The purpose of this statute is to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime.” (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312 (*Hutchins*).

“The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them.” (*Hutchins, supra*, 90 Cal.App.4th at p. 1312.) The court’s findings may be either express or implied from the court’s ruling. (See *People v. Blake* (1998) 68 Cal.App.4th 509, 512.) In the absence of any reference to section 654 during sentencing, the fact that the court did not stay the sentence on any count is generally deemed to reflect an implicit determination that each crime had a separate objective. (See, e.g., *People v. Blake*, at p. 512; *People v. Osband* (1996) 13 Cal.4th 622, 730-731.) “ ‘We must “view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]” [Citation.]’ [Citation.]” (*Hutchins*, at pp. 1312-1313.)

“Although the question of whether defendant harbored a ‘single intent’ within the meaning of section 654 is generally a factual one, the applicability of the statute to conceded facts is a question of law. [Citation.]” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

In this matter, the evidence shows that defendant possessed the gun solely for the purpose of concealing or destroying it. He had no apparent intent or objective when he picked up the gun other than to get rid of it at Gurule’s behest. In *People v. Jones* (2002) 103 Cal.App.4th 1139, the appellate court upheld the imposition of separate sentences for being a felon in possession of a firearm and shooting at an

inhabited dwelling. The court reasoned that when a felon arrives at the crime scene already armed with a firearm, the possession is a “separate and antecedent offense, carried out with an independent, distinct intent . . . .” (*Id.* at p. 1141.) The court distinguished this factual scenario from the situation in which a defendant wrested a highway patrol officer’s gun away from him and then shot at the officer. In that case (*People v. Bradford* (1976) 17 Cal.3d 8), the California Supreme Court found that punishment for both assault with a deadly weapon on a peace officer and possession of a firearm by a felon was prohibited by section 654. This is because the possession of the firearm was not antecedent to and separate from the use of the gun to shoot at the officer. (*Jones*, at p. 1144, citing *Bradford*, at pp. 22-23.) The court in *Jones* further explains the difference between the two situations thusly: “It is clear that multiple punishment is improper where the evidence ‘demonstrates at most that fortuitous circumstances put the firearm in the defendant’s hand only at the instant of committing another offense . . . .’ [Citation.]” (*Jones*, at p. 1144.) In the current matter, it is clear that defendant’s possession of the gun he picked up off the ground was not “antecedent and separate” from his action to conceal or destroy the gun. To further the point, “circumstances”<sup>5</sup> placed the gun in his hand at the same instant he began to commit the crime of destroying or concealing the gun as evidence.

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<sup>5</sup> By “circumstances” we do not mean that defendant played other than an active role in running out and picking up the gun at the direction of Gurule, any more than the *Jones* court used the term “fortuitous circumstances” to describe the *Bradford* defendant’s actions in taking the gun from the highway patrol officer as anything other than purposeful.

To conclude, under these circumstances, section 654 prohibits the imposition of a separate sentence for the misdemeanor crime of destroying or concealing evidence.

**DISPOSITION**

The matter is remanded to the trial court with directions to stay the sentence on defendant's conviction for destroying or concealing evidence (§ 135), pursuant to section 654. Following resentencing, the superior court clerk is directed to prepare the new sentencing minute order and new abstract of judgment, and then forward certified copies of the minute order and abstract of judgment to the Department of Corrections and Rehabilitation.

In all other respects, the judgment is affirmed.

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RAMIREZ  
P. J.

We concur:

KING  
J.

CODRINGTON  
J.