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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.

ELLIS RAY COOPER,

Defendant and Appellant.

E053179

(Super.Ct.No. FVA1000027)

OPINION

APPEAL from the Superior Court of San Bernardino County. Stephen A. Mapes, Judge. Affirmed.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland and Kevin Vienna, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Ellis Ray Cooper guilty of receiving or concealing stolen property. (Pen. Code, § 496, subd. (a).)<sup>1</sup> In a bifurcated proceeding, the trial court found true that defendant had suffered five prior prison terms (§ 667.5, subd. (b)) and 10 prior serious or violent strike convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). After the trial court denied defendant's motion to dismiss nine of his prior strike convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), he was sentenced to a total term of 25 years to life in state prison with credit for time served. Defendant's sole contention on appeal is that the trial court abused its discretion in denying his *Romero* motion. We find no abuse and will affirm the judgment.

#### FACTUAL BACKGROUND

On January 2, 2010, the victim returned home from a vacation and noticed that her normally latched side gate was open. She went into her backyard, where she noticed four patio chairs, two planters, and a barbeque grill, all worth about \$300, were missing from her back patio. The victim then walked to the front yard, where she observed her garden hose attached to the faucet of defendant's front yard—defendant was her neighbor. The victim then went to her second-story balcony, which allowed her to see into defendant's backyard, to determine if her missing items were in his backyard. Upon looking into defendant's backyard, she saw two of her missing patio chairs and one of her missing

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

planters. She also saw her other two missing patio chairs in the yard of the neighbor adjacent to defendant.

After calling the police department to seek advice on what to do, the victim went to defendant's house and contacted him while he was in his backyard. Following a conversation with defendant in which she informed him that he had her property and she wanted it back, defendant returned the stolen property from his and his neighbor's home, with the exception of the barbeque grill and one planter. Because she was still missing the other items, the victim again called the police.

Officer Michels responded to the call and spoke with the victim. Officer Michels thereafter went to speak with defendant. Defendant claimed that the victim had given him permission to take the items because she was moving.<sup>2</sup> However, when Officer Michels informed defendant that the victim had not given him such permission, defendant said he had apologized to her and had returned the four chairs and a planter. Officer Michels then asked defendant about the missing barbeque and additional planter. Defendant admitted that he had hidden those items at his neighbor's house. Officer Michels subsequently recovered those missing items and returned them to the victim.

## DISCUSSION

Defendant contends the trial court abused its discretion by refusing to strike *nine* of his prior serious or violent felony convictions pursuant to *Romero, supra*, 13 Cal.4th 497, and sentencing him as a two-strike offender. We disagree.

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<sup>2</sup> At the time of the incident, the victim's house was in foreclosure and had a "For Sale" sign on the front lawn.

In *Romero*, the Supreme Court held that a trial court has the discretion to dismiss three-strike-prior-felony-conviction allegations under section 1385. (*Romero, supra*, 13 Cal.4th at pp. 529-530.) However, the court cautioned, while a trial court’s power to dismiss an action under section 1385 is broad, it is not unlimited and is subject to review for abuse of discretion. (*Id.* at p. 530; *People v. Carmony* (2004) 33 Cal.4th 367, 375.) We will not find an abuse of discretion unless the trial court’s decision is “so irrational or arbitrary that no reasonable person could agree with it.” (*Carmony*, at p. 377.) It is the defendant’s burden as the party attacking the sentencing decision to show that it was arbitrary or irrational and, absent such showing, there is a presumption that the court ““acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.”” [Citations.]” (*Ibid.*)

The touchstone of the analysis is ““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.” [Citation.]” (*People v. Carmony, supra*, 33 Cal.4th at p. 377.)

Defendant here urges that the relevant criteria militated in favor of striking nine of his 10 prior serious or violent felony convictions. First, he argues the current offense was relatively minor, insignificant, and nonviolent. Second, he asserts that no weapons were used in the commission of the crime; that he was cooperative with the victim; and that all of the victim’s property was returned within a few hours after she noticed its

disappearance. Finally, he urges that his age of 54 years and partial paralysis should be considered, since he poses no significant threat to the safety of the public.

We cannot conclude that the trial court abused its discretion in declining to strike *nine* of defendant's prior strike convictions. The relevant considerations supported the trial court's ruling, and there is nothing in the record to show that the court declined to exercise its discretion on improper reasons or that it failed to consider and balance the relevant factors, including defendant's personal and criminal background. In fact, the record clearly shows the court was aware of its discretion, aware of the applicable factors a court must consider in dismissing a prior strike, and appropriately considered and balanced the factors outlined above.<sup>3</sup> Specifically, the trial court stated, ". . . looking at the cases that talked about *Romero*, and I think *Williams*, you know, we have an ongoing—yeah, this time it's a very low-grade crime. But his history is not. And it's repeated, and it's numerous. And he hasn't discharged a prison number from parole without picking up something else. And I think he does—there's no doubt in my mind he does fall in the spirit of the three strikes law. [¶] So the *Romero* motion will be denied. However, when it comes to the 667.5 priors, . . . I'm going to take into consideration the fact that he was cooperative and returned the things, and it was of a non-violent nature. And so I'm going to impose those, but strike the punishment of those."

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<sup>3</sup> We note that the trial court struck defendant's five prior prison term enhancements in the interest of justice, citing defendant's cooperation and nonviolent nature of the offense.

Defendant has manifested a persistent inability to conform his conduct to the requirements of the law. His past criminal history is extensive and serious. As recognized by the trial court, although defendant's current crime was nonviolent, defendant does have a serious prior record of criminal behavior. Defendant was in and out of jail or prison continually from 1975 to 2000, when he was placed on parole. He appears to have been subject to continuous criminal justice supervision for his entire adult life. Indeed, defendant has had the same state prison number since 1978, never being discharged based on either new cases or parole violations. Defendant's criminal record includes numerous theft-related offenses, numerous armed robberies, several attempted armed robberies, several assaults likely to cause great bodily injury, an assault with a deadly weapon, an attempted murder, a forcible rape, and poor performances on probation and parole. Although defendant's last crime was in 2000, he was subsequently placed on parole, but violated his parole twice, the last time in June 2009, a mere seven months before he committed the current crime.

The trial court here could not overlook the fact that defendant continued to commit criminal offenses and violate the terms and conditions of his parole even after repeatedly serving time in prison. His conduct as a whole was a strong indication of his unwillingness or inability to comply with the law. His disregard for the law is evidenced by his continual parole violations and criminal convictions. It is clear from the record that prior rehabilitative efforts have been unsuccessful. Indeed, defendant's prospects for the future look no better than the past, in light of defendant's record of prior offense and reoffense. All of these factors were relevant to the trial court's decision under *Romero*.

There is no indication from the record here that the trial court failed to consider the relevant factors, that it failed to properly balance the relevant factors, that it abused its discretion in determining that, as a flagrant recidivist, defendant was not outside the spirit of the three strikes law. (*People v. Carmony, supra*, 33 Cal.4th at pp. 375, 377-378.)

Defendant appears to be “an exemplar of the ‘revolving door’ career criminal to whom the Three Strikes law is addressed.” (*People v. Stone* (1999) 75 Cal.App.4th 707, 717.) Thus, given defendant’s continuous criminal history, his numerous parole violations, the seriousness of the past offenses, and his seemingly dim prospects for rehabilitation and lack of meaningful crime-free periods, we cannot say that the trial court abused its discretion when it declined to dismiss nine of defendant’s 10 prior strike convictions.

DISPOSITION

The judgment is affirmed.

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RAMIREZ  
P. J.

We concur:

KING  
J.

CODRINGTON  
J.