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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.

TAFT LAMAR HILL,

Defendant and Appellant.

E053803

(Super.Ct.No. SWF10001914)

OPINION

APPEAL from the Superior Court of Riverside County. Mark A. Mandio, Judge.

Affirmed.

Richard Jay Moller, 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, Assistant Attorney General, Meagan J. Beale and Raquel M. Gonzalez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Taft Lamar Hill of four counts of commercial burglary (counts 1-4—Pen. Code § 459)<sup>1</sup> and one count of possession of stolen property (§ 496, subd. (a)). After a bifurcated trial thereafter, the court found true allegations defendant had sustained two prior strike convictions (§§ 667, subds. (c) & (e)(2)(A), 1170.12, subd. (c)(2)(A)) and served three prior prison terms (§ 667.5, subd. (b)). The court sentenced defendant to an aggregate term of incarceration consisting of a determinate term of eight years, four months and an indeterminate term of 25 years life. On appeal, defendant contends the prosecutor committed *Wheeler/Batson*<sup>2</sup> error in excluding an African-American from the jury, the court erred in permitting officers to testify regarding defendant's self-incriminating statements in violation of *Miranda*,<sup>3</sup> and the court erred in refusing to strike one of defendant's prior strike convictions with respect to its sentence on count 3. We affirm.

### **FACTUAL AND PROCEDURAL HISTORY**

On April 3, 2010, someone from their alarm company contacted RadioShack store manager Gilma Orodenez sometime between 2:00 and 3:00 a.m. to report the store's alarm had been triggered. When Orodenez arrived at the store, she reviewed the surveillance video with the police. A socket had been used to break the window. Someone entered the store and stole objects including televisions, cameras, GPS systems,

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

<sup>2</sup> *People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79.

<sup>3</sup> *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

and universal computer adaptors. The total amount of loss was valued at around \$2,300. The People played the video surveillance recording for the jury.

On September 1, 2010, Kristen James, a worker at Threads Clothing Store, received a phone call regarding a break-in at the store sometime around 4:00 a.m. James went to the store to speak with police. The back window of the store had been broken. The store's counter was pushed over, knocking a monitor screen, the register, and other objects to the floor; a connected power pole was also knocked down; the ceiling was broken; and power cords were hanging from the ceiling. A rack of jeans, a number of T-shirts, hats, belts, purses, sunglasses, and a laptop were missing; the stolen items had attached sales tags. The value of merchandise stolen was estimated at \$5,000. The People played a video recording of the burglary to the jury.

On September 4, 2010, Mark Buri's optometry store, Hemet Family Eye Care Center, was broken into around 4:49 a.m., through the large picture window in the front of the store; "Numerous eyeglass frames were missing and some displays." In addition to the window, several display cases were damaged. All Dr. Buri's eyeglass frames had inventory tags on them. Dr. Buri's total damage from loss and destruction came to roughly \$16,000.

On September 5, 2010, Jose Lopez, the parts sales manager for AutoZone, responded to an alarm call at his store a little after 5:30 a.m. He met two police officers there. A cinder block was found inside the store, which had apparently been used to break through the window. Two sets of wrenches were found on the floor of one of the aisles; Lopez also found empty stereo boxes on another aisle, which were normally kept

locked in the manger's officer. Nevertheless, it did not appear as if anything had been taken from the store.

On September 7, 2010, Detectives Joe Gutierrez and Michael Mouat of the Hemet Police Department, were "working surveillance detail, watching several businesses in the city due to several burglaries that had taken place between April and September."

Detective Gutierrez "noticed a dark green minivan pull up to the front of the RadioShack." "It parked in front of the location and turned its headlights off. Whoever was inside of it sat there for awhile." When the vehicle left, he followed. At some point, the driver turned off the vehicles headlights and turned into oncoming traffic.

Eventually, they conducted a traffic stop of the vehicle.

Three people were inside: defendant was driving, Adam Soliz was in the front passenger seat, and Edniesha Roland was lying down in the rear of the vehicle. They searched the vehicle and located a pair of eyeglasses with an inventory tag from Hemet Family Eye Care Center. They also located a backpack with several sunglasses and eyeglasses that also had inventory tags on them from Hemet Family Eye Care Center. A search of defendant revealed a pair of glasses in his breast pocket, which matched those found in the vehicle. Dr. Buri came to the scene and identified the property as belonging to him.

All three individuals were arrested and taken back to the police station. At the police station, defendant gave permission for them to search his home. A search of the home turned up more sunglasses and eyeglasses, a bag of inventory tags from Hemet Family Eye Care Center, clothing with a tag from Threads Clothing Store, and a radio

from RadioShack. Dr. Buri went to the police station within a week of the break-in and inspected the frames that were suspected as having been taken from his business. He recognized a variety of frames as belonging to his business, some of which still had his inventory tags on them. Dr. Buri identified between 25 and 50 frames as belonging to him.

After the search of defendant's home, Detective Gutierrez read defendant his rights; defendant indicated he understood his rights and agreed to speak with them. Detective Gutierrez was the investigating officer who asked the majority of questions, but Detective Mouat questioned defendant as well. They told defendant what they found in the vehicle, that they had witnessed video footage of the burglaries, and knew he was involved. Defendant complained of chest pain; they requested paramedics respond to the police station; the paramedics arrived and transported defendant to the hospital. Detective Mouat traveled with defendant to the hospital. Defendant admitted being under the influence of methamphetamine.

At the hospital, defendant told Detective Mouat that four months earlier he had broken a window at RadioShack and had stolen two flat screen televisions and other objects. He said he had broken a window at Threads Clothing Store a week earlier and stole some pants, hats, purses, and a laptop. He said a few days prior, he threw a cinder block through the window next to the front door of the AutoZone in Hemet; he did not take anything because "once he got in, he became paranoid and scared and ran out the back door." Defendant admitted breaking into Hemet Valley Eye Care Center, but would not

go into further detail regarding the incident. Defendant stated that if released, he would return some of the stolen merchandise.

Detective Mouat later called Detective Gutierrez to inform him defendant wished to speak with him. Defendant told Detective Gutierrez he purchased the stolen property they had found on the streets, in order to purchase drugs.

## DISCUSSION

### A. WHEELER/BATSON ERROR

Defendant contends the court erred in denying his *Wheeler/Batson* motion because the People impermissibly excused African-American prospective juror Terry Patrick based on his race.<sup>4</sup> We hold substantial evidence supported the court's denial of defendant's motion.

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<sup>4</sup> Defendant notes the People excused another African-American prospective juror, Patsy Thomas, but that defendant does not challenge her excusal. Nevertheless, defendant maintains that, including Thomas, the People used 20 percent of their challenges to eliminate black jurors from the jury. Defendant also observed the People had exercised its challenges so as to exclude all African-American jurors from the jury panel, that there were only three back jurors in the venire, but that the third prospective African-American juror was never called. As the People note, defendant's latter observation is belied by the record in which the court observed that juror No. 6 was African-American. In its respondent's brief, the People briefly discuss the examination and excusal of Thomas. In his reply, defendant concedes an African-American was a member of the jury; however, he notes that whether the jury ultimately contained an African-American juror is irrelevant to the issue as raised. (*People v. Williams* (2006) 40 Cal.4th 287, 311 ["[W]e review whether the trial court's decision was correct at the time it was made and not in light of subsequent events."]; *People v. Avila* (2006) 38 Cal.4th 491, 549 ["[T]he issue is not whether there is a pattern of systematic exclusion; rather, the issue is whether a particular prospective juror has been challenged because of group bias. [Citation.]".]) Nonetheless, it is apparent the People were only attempting to set right the misstatement made by defendant in his opening brief. Moreover, the People's discussion of Thomas is perfectly legitimate considering defendant's assertion of

[footnote continued on next page]

Prospective juror Terry Patrick reported he had sustained two convictions for driving under the influence in the summer of 1992. When asked regarding how he felt they were handled, he responded, “I felt that the penalties was steep. I paid for them generously. I’m happy to say 15 years without a drop. I quit drinking because of it. And I actually—after I did my classes, I actually went back to the judge who gave me those classes and thanked him.”

Patrick had also been arrested for possession of a dangerous weapon, a bar in his brother’s car that was used to brace the seat so it would not slide back: “I feel that it wasn’t a weapon at all. . . . And the officer went under there and kind of snatched the bar out, and the seat fell back. And he said this is a weapon, and he arrested me. They took me to jail.” Patrick felt the incident was not handled well; the judge let him go the next morning, but “I felt he could have handled that totally different.” Patrick had worked “for the Department of California Corrections for two years side by side with many officers, and I seen the good and bad on both sides working.” The People at one point accepted the panel as constituted, with Patrick; however, after defendant excused another juror, the People excused Patrick. Defendant asked to bring a *Wheeler/Batson* motion.

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*[footnote continued from previous page]*  
systemic exclusion by stating the People had utilized 20 percent of its challenges to exclude black members from the jury.

Defendant argued it “appears from the entire jury venire that there are only three black people in the entire venire, two of whom were called up as potential jurors, and both of those two were systematically kicked from the jury by [the People].” The People countered, “I don’t believe that at this state that this—the exercise of two out of seven peremptory challenges rises to the level of a systematic exclusion of a cognizable group, thus, requiring the People to state their non-race based reasons at this stage.”<sup>5</sup>

The court observed, “[i]t does appear to me there’s been a prima facie showing. . . . [¶] Remember, we’re only talking about prima facie showing. [Defendant] himself is black. Okay. And I think you are correct, you did use two of your peremptory challenges out of nine, and I think the disproportionate use, you can’t just look at two out of nine, but two out of nine versus the number in the panel. So simply for purposes of finding a prima facie showing, I’m going to find prima facie showing and listen to your explanations for your challenges to Mr. Patrick and Ms. Thomas.” The People replied, “[w]ith regard to Mr. Terry Patrick, the Court may recall that prior to Terry Patrick being placed into the actual 12 venire, there was an individual by the name of Mr. Blackmon. This individual indicated that he had a problem with law enforcement.” The People had excused Blackmon because he had a DUI conviction and complained that the police celebrated the arrest.

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<sup>5</sup> “Although circumstances may be imagined in which a prima facie case could be shown on the basis of a single excusal, in the ordinary case . . . to make a prima facie case after the excusal of only one or two members of a group is very difficult. [Citation.]” (*People v. Bell* (2007) 40 Cal.4th 582, 598, fn. 3.)

Thus, the People noted that with respect to Mr. Blackmon, “when I had an opportunity to try to rehabilitate this individual, that I made pretty much what I like to refer to as a rah-rah speech with regard to law enforcement officers and the duty that they perform when it comes to the potential killers that are drunk drivers. [¶] As the Court may recall, Mr. Terry Patrick not only had one prior conviction, but two prior convictions. I think he disclosed to us while they were awhile ago and he’s never had a drink since, he indicated that it was a bad month.”

The People continued, “[w]hat I do know is this: That [Patrick] has two prior convictions for DUIs. I have adamant strong feelings about those that choose to drink and drive, and I did not want to take a chance that my rah-rah speech offended him. And as such, I exercised my peremptory challenge.” The court noted, “I do find that you have provided sufficient race-neutral justifications in exercise of your peremptory challenges. I did observe your rah-rah speech. . . . I do see what you were saying there. You could have offended him.” Thus, the court denied defendant’s motion.

“Both the state and federal Constitutions prohibit the use of peremptory challenges to remove prospective jurors based solely on group bias. [Citations.]” (*People v. Watson* (2008) 43 Cal.4th 652, 670.) “There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination. [Citations.] To do so, a defendant must first ‘make out a prima facie case “by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.” [Citation.] Second, once the defendant has made out a prima facie case, the “burden shifts to the State to explain adequately the

racial . . . exclusion” by offering permissible race-neutral . . . justifications for the strike[.] [Citations.] Third, “[i]f a race-neutral . . . justification is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful . . . discrimination.” [Citation.]’ [Citation.]” (*People v. Bonilla* (2007) 41 Cal.4th 313, 341, quoting *Johnson v. California* (2005) 545 U.S. 162, 168.)

If the trial court concludes that the defendant has made a prima facie case, and if the prosecutor offers a race-neutral justification, “the trial court “must make ‘a sincere and reasoned attempt to evaluate the prosecutor’s explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily . . . .’ [Citation.]” [Citation.]” (*People v. Watson, supra*, 43 Cal.4th at p. 670.) “[T]he critical question . . . is the persuasiveness of the prosecutor’s justification for his peremptory strike.’ [Citation.] The credibility of a prosecutor’s stated reasons for exercising a peremptory challenge ‘can be measured by, among other factors . . . how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.’ [Citation.]” (*People v. Lewis* (2008) 43 Cal.4th 415, 469.)

“The justification need not support a challenge for *cause*, and even a “trivial” reason, if genuine and neutral, will suffice.’ [Citation.]” (*People v. Lenix* (2008) 44 Cal.4th 602, 613.) “Review of a trial court’s denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. [Citation.]” (*Ibid.*) “All that matters is that the prosecutor’s reason for exercising the

peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory.’ [Citation.] A reason that makes no sense is nonetheless ‘sincere and legitimate’ as long as it does not deny equal protection. [Citation.]” (*People v. Guerra* (2006) 37 Cal.4th 1067, 1100-1101, disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

We hold substantial evidence supports the People’s stated non-discriminatory basis for excusing Patrick. As noted above, the People had excused another prospective juror who had sustained only one prior DUI conviction. That juror had expressed disillusionment in the manner in which the incident was handled because the officers appeared to celebrate the arrest. The People attempted to rehabilitate the juror by expressing that perhaps the officers were merely celebrating having removed someone who posed a danger to life and limb from the road. Patrick had sustained two DUI convictions in one summer. Although he did not express as vehement a repugnance as Blackmon with the manner in which his arrest was handled, he did note the penalties were stiff and that “It was a rough year.” The People’s stated reason that Patrick had experienced negative interactions with police officers twice within a relatively short period of time was a sufficiently persuasive, non-discriminatory reason for excusing him.

B. MIRANDA

Defendant contends the court erred in permitting the People to present the testimonies of Detectives Gutierrez and Mouat regarding defendant’s self-incriminating statements, because they were made involuntarily, and that he should have been readvised of his rights once questioning resumed at the hospital. We disagree.

The People filed a trial brief on April 8, 2011, seeking admission of defendant's statements to the police in anticipation of defendant's attempt to exclude those statements. On April 11, 2011, the court held a hearing on defendant's motion. Detective Gutierrez testified that after he took custody of him, defendant signed a consent form acceding to their search of his residence.

After the search, Detective Gutierrez returned to the police station in order to interview defendant. Prior to the interview, Detective Gutierrez read defendant his *Miranda* rights: ““You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you're being questioned. [¶] If you cannot afford to hire a lawyer, one will be appointed free of charge to represent you before any questioning if you wish. [¶] You can decide at any time to exercise these rights and not answer any question or make any statements. [¶] Do you understand each of these rights I explained to you? Having these rights in mind, do you wish to talk to us?”” Defendant responded ““Uh-huh”” which Detective Gutierrez took to mean “yes.”

Detective Gutierrez told defendant they had found stolen property in the vehicle. Defendant stated it was not his. Detective Gutierrez continued to speak with defendant for approximately 10 minutes before defendant appeared “to have some health issues. He was breathing heavy, and I had asked him if he wanted medical attention. And he said yes.” Paramedics responded to the station and defendant was transported to the hospital. Detective Mouat went with defendant to the hospital.

At some point, Detective Mouat contacted Detective Gutierrez and informed him defendant wished to speak with him. When he arrived at the hospital, he asked defendant if defendant wished to speak with him; defendant said ““Yes.”” According to Detective Gutierrez, it was approximately 20 to 30 minutes between the time he read defendant his *Miranda* rights and spoke with defendant in the hospital. He did not readvise defendant of his rights; he did not inquire as to whether defendant had been given any medication. Defendant told Detective Gutierrez he had purchased the stolen property located at his house off the streets with the intent to trade it for narcotics. Detective Gutierrez’s interview with defendant at the hospital lasted 10 to 15 minutes. Defendant appeared the same as he had in the interview room: “Coherent, understanding my questions.”

Detective Mouat testified he first came into contact with defendant on September 7, 2010, during a traffic stop. He was present when Detective Gutierrez read defendant his *Miranda* advisements; defendant agreed to speak with them. Approximately an hour elapsed between when the interview ceased at the police station and resumed at the hospital. Detective Mouat remained with defendant as he went to the hospital and after his arrival. Defendant told Detective Mouat he was high; nevertheless, defendant appeared coherent.

In the hospital, defendant discussed each of the four burglaries he committed in Hemet; he described how he entered each of the buildings. Defendant attempted to make a deal: “He was concerned about getting another strike, doing 85 percent time if he was convicted, and so on.” Detective Mouat then contacted Detective Gutierrez, who arrived toward the end of Detective Mouat’s interview with defendant.

The court observed, “It seems to me we’re talking about approximately an hour and a half break between the end of the first interview and the beginning of talking to him again. Maybe two hours, at most.” The court noted defendant asked to speak with Detective Gutierrez “which also indicates his desire to continue the interview. . . . [¶] At any rate, these interrogations are essentially contemporaneous. There’s not sufficient enough amount of time between them to require the . . . readvisement of [defendant]. I don’t see anything about the hospital situation that makes that different. Both officers felt that he was coherent. That he answered questions appropriately. He understood who they were and why they were questioning him. Therefore, it appears to me that the statements of [defendant] would be admissible in evidence. The advisement appeared to be proper as well.”

1. *VOLUNTARINESS OF WAIVER*

No person . . . shall be compelled in any criminal case to be a witness against himself . . .” (U.S. Const., 5th Amend.) “[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege . . .” (*Miranda, supra*, 384 U.S. at pp. 478-479.) These procedural safeguards include a police advisement that the individual has the right to remain silent; that anything he says may be used against him in a court of law; that he has the right to the presence of an attorney; and that if he cannot afford one, one will be appointed free of charge. (*Id.* at p. 479.)

When considering a claim that a statement was inadmissible at trial because it was obtained in violation of *Miranda* rights, the scope of review is well established. ““We must accept the trial court’s resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.]”” (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033.) “““[W]hen two or more inferences can reasonably be deduced from the facts,” either deduction will be supported by substantial evidence, and “a reviewing court is without power to substitute its deductions for those of the trial court.” [Citation.]’ [Citation.]” (*In re Eric J.* (1979) 25 Cal.3d 522, 527.) The reviewing court then independently determines whether the challenged statement was obtained in violation of *Miranda*. (*People v. Farnam* (2002) 28 Cal.4th 107, 178.)

Here, defendant voluntarily waived his *Miranda* rights and voluntarily, knowingly, and intelligently agreed to speak with the officers. Defendant identifies no flaw in Detective Gutierrez’s *Miranda* advisement to defendant, nor do we find any. Defendant responded that he understood his rights and wished to speak with the officers. There is no evidence defendant showed any indication of health problems or drug impairment when the officers initiated the interview. Detective Gutierrez spoke with defendant for 10 minutes before defendant began to show signs of a health problem.

It is unclear at what point defendant informed Detective Mouat that he was under the influence of drugs, but from the chronology of Detective Mouat’s testimony, it would appear this did not occur until after defendant arrived at the hospital. Nevertheless, at all times defendant appeared “coherent.” At most, two hours elapsed between the end of the initial interview and the beginning of the second. Detective Mouat was with defendant

the entire time; from his arrest, the first interview, the trip to the hospital, during his own interview with defendant in the hospital, and during Detective Gutierrez's subsequent interview with defendant at the hospital. No evidence was presented that defendant actually suffered from or was treated for any real medical condition.

In making a determination of whether a waiver has been made with full awareness, courts should consider a number of factors, including the defendant's age, native language, intelligence, physical condition, experience with the criminal justice system, the length of time between the advisement and the waiver, and whether the waiver was explicit. (*United States v. Bernard S.* (9th Cir. 1986) 795 F.2d 749, 751-753 [age and language]; *Stawicki v. Israel* (7th Cir. 1985) 778 F.2d 380, 382-384 [intelligence and prior experience with police]; *United States ex rel. Patton v. Thieret* (7th Cir. 1986) 791 F.2d 543, 547-548 [passage of time]; *United States v. Hack* (10th Cir. 1986) 782 F.2d 862, 866 [physical condition]; *North Carolina v. Butler* (1979) 441 U.S. 369, 373 [express, written waiver]; *United States v. Alderdyce* (9th Cir. 1986) 787 F.2d 1365, 1368 [background, experience, written waiver].)

Here, there is no indication defendant experienced anywhere near the level of physical discomfiture found by the court in *Hack* not to have made the defendant's waiver involuntary. (*United States v. Hack, supra*, 782 F.2d at pp. 865-866 [defendant in hospital and "uncomfortable" from gunshot wound to his mouth incurred two days earlier that required a prescription analgesic].) Defendant was 39 years old at the time of his interview; spoke English; and had extensive prior experience with the criminal justice system, including four prior misdemeanor convictions, four prior felony convictions, two

probation revocations, and two parole revocations. Defendant's admissions at the hospital were voluntarily made after he voluntarily waived the rights of which he was properly advised.

## 2. READVISEMENT

“[R]eadvisement is unnecessary where the subsequent interrogation is “reasonably contemporaneous” with the prior knowing and intelligent waiver. [Citations.] The courts examine the totality of the circumstances, including the amount of time that has passed since the waiver, any change in the identity of the interrogator or the location of the interview, any official reminder of the prior advisement, the suspect's sophistication or past experience with law enforcement, and any indicia that he subjectively understands and waives his rights.’ [Citations.]” (*People v. Pearson* (2012) 53 Cal.4th 306, 316-317.)

Here, the passage of less than two hours between defendant's waiver of his rights, the cessation of the first interview, and the initiation of the second did not require a readvisement of his rights. (*People v. Pearson, supra*, 53 Cal.4th 306, 317 [passing of 27 hours between advisement and waiver and subsequent interview did not require readvisement]; *People v. Williams* (2010) 49 Cal.4th 405, 434-435 [passing of 40 hours between advisement and waiver and subsequent interview did not require readvisement]; *People v. Smith* (2007) 40 Cal.4th 483, 504-505 [passing of less than 12 hours between advisement and waiver and subsequent interview did not require readvisement]; *People v. Mickle* (1991) 54 Cal.3d 140, 171 [passing of 36 hours between advisement and waiver and subsequent in-hospital interview did not require readvisement].) Although the

interview took place in another location, Detective Mouat remained with defendant from his initial advisement and interview through his final interview with Detective Gutierrez. Defendant had extensive experience with the criminal justice system. No readvisement was required.

C. ROMERO

Defendant contends the court abused its discretion in declining to strike a prior strike attached to each of the counts for which the jury convicted him. Defendant maintains the court was unaware of its discretion to strike one of the strikes attached to count 3. We disagree.

On December 1, 2010, the People filed a preemptive opposition to defendant's anticipated pretrial request that the court strike the prior strike conviction allegations against him. Both prior strike convictions arose from the same incident and conviction. On February 17, 1997, defendant robbed a Church's Fried Chicken, during which he punched a female clerk in the face and threatened to kill her if she did not open the register; after she complied, he told her to get on the ground where he kicked her. Defendant then struck a male clerk in the face and kicked him while he was on the floor. Defendant grabbed a pitcher of boiling cooking oil and poured it on the male clerk's face and head; the clerk sustained permanent scarring and disfigurement. The People noted defendant's extensive criminal history and six parole revocations.<sup>6</sup>

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<sup>6</sup> The latter factual assertion is contradicted by the probation officer's report, which reflects two parole revocations.

On December 21, 2010, defendant filed a request pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 and section 1385, that the court strike defendant's prior strike convictions contending he was outside of the spirit of the "Three Strikes" law based on the non-violent character of the "wobbler" charges he currently faced, the fact that the strike priors arose out of one incident, that defendant struggled with drug addiction and mental illness, and defendant's other convictions were non-violent and drug related. On January 3, 2011, the court denied the motion.

On January 28, 2011, defendant filed a request for judicial notice in which he requested the court strike his prior strike convictions. Defense counsel filed a preplea report on February 22, 2011, similarly requesting the court strike the prior strike conviction allegations. On April 11, 2011, the court indicated its tentative decision was to deny the request to strike any prior strike conviction allegations because two people had been injured in the prior conviction incident, defendant's current crimes involved the theft of substantial amounts of property, defendant had been in and out of incarceration and in and out of parole such that he had spent little time out of jail or prison crime-free, and that defendant had no real prospects for the future. The court ultimately declined to issue a ruling, finding that the decision as to whether to strike prior conviction allegations was a sentencing issue.

At defendant's sentencing on June 10, 2011, defendant orally requested the court strike each of the prior strike enhancements and sentence defendant to a determinate term. The court noted that "while a court can exercise discretion in the interest of justice to strike a strike, it has to be done with reference to the spirit of the three strikes law . . .

which is to punish recidivism . . . .” Although the court thought “14 years would be an appropriate sentence in this case. . . . I have to carefully evaluate in determining whether to strike a strike certain factors, including [defendant’s] prior convictions. Particularly, look at the strikes themselves; the nature and seriousness of the prior strikes; how old they are; whether he’s committed new offenses since that time; whether the strikes were committed in one incident; if they were committed in one incident, were they committed against more than one victim.”

“And I need to look at his prospects, particularly in terms of whether or not he’s likely to continue to be a recidivist. So when I look at those factors, I feel that this is a pretty close case. Here’s why. Number one, both his strikes . . . are his only violent offenses. Each strike arose out of a single incident, a robbery that occurred . . . in 1997. March 17th, 1997. Were that the only set of facts, when I look at the rest of his record, when I look at his prospects for not being a recidivist, I would probably strike both strikes—I’m sorry—one strike in this case. [¶] But when I look at the particulars of the prior strike convictions, he was convicted for two [robberies] because there were two victims, one of which was hurt very badly. And it wasn’t just an assault that was part and parcel of a robbery. It was a wanton act that was really inexplicable to me, burning that individual.”

Nevertheless, the court struck one of each of the prior strike enhancements attached to counts 1 and 2. It reduced counts 4 and 5 to misdemeanors pursuant to section 17, subdivision (b). The court refused to strike either of the prior strike conviction enhancements attached to the count 3 offense. Thus, the court sentenced

defendant to total determinate term of eight years, four months, and an indeterminate term of 25 years to life.

“[A] court’s failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard.” (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) Under this standard, the defendant bears the burden of establishing an abuse of discretion. In the absence of such a showing, the trial court is presumed to have acted correctly. The appellate court may not substitute its judgment for that of the trial court when determining whether the trial court’s decision to strike the prior was proper. (*Id.* at pp. 376-377.) “[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.’ [Citation.]” (*Id.* at p. 377.) ““Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court’s ruling, even if we might have ruled differently in the first instance’ [citation].” (*Id.* at p. 378.)

Here, the record abundantly indicates the court considered the proper criteria in making a determination of whether to strike prior strike conviction enhancements. The court engaged in a lengthy exposition of defendant's current crimes and past criminal history. Defendant was facing a potential sentence of five consecutive 25-years-to-life terms (125 years to life); that was the recommendation of the probation officer. The court struck a prior strike conviction enhancements attached to each of counts 1 and 2, demonstrating unequivocally that it understood it had the power to do so.

Defendant had four previous misdemeanor and four prior felony convictions dating back to 1991. He spent much of the intervening years in jail or prison. Defendant had two prior revocations of probation and parole. Attached to one of defendant's requests that the court strike one or more of his strike conviction enhancements was his mother's own statement defendant "has been in and out of jail and prison." In an attached denial of social security disability benefits, the administration noted defendant, a then 38 year old man, had no work experience. When sentenced on a 2006 felony conviction, the prior court had struck one of defendant's prior strike conviction enhancements, granting leniency of which defendant failed to take advantage.

As noted by the court, defendant's prior strike convictions involved gratuitous and serious injury to the victims. Defendant's current convictions involved at least four separate acts of vandalism and three separate acts of theft. The facts adduced at trial established a total loss of \$23,300, a not-inconsequential amount. The court acted within its discretion in refusing to strike one of the strike conviction enhancements attached to count 3.

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER  
J.

We concur:

RAMIREZ  
P. J.

HOLLENHORST  
J.