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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.

DEREK TYRONE BURTON,

Defendant and Appellant.

E054398

(Super.Ct.No. FBA1000492)

OPINION

APPEAL from the Superior Court of San Bernardino County. Victor R. Stull, Judge. Affirmed.

Jean Ballantine, 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, Lilia E. Garcia and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Derek Tyrone Burton of one count of first degree residential burglary. (Pen. Code, § 459, count 1.)<sup>1</sup> Following a bifurcated trial on defendant's priors, the jury found that he had two prior strike convictions (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) and two prior serious felony convictions (§ 667, subd. (a)(1)). Defendant filed a motion to have the trial court dismiss a prior strike conviction under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), but the court denied it. The court sentenced him to state prison for a total term of 30 years to life.

On appeal, defendant contends that the court abused its discretion by refusing to strike one or both of his prior strike convictions. We affirm.

#### FACTUAL BACKGROUND

Late one afternoon in July 2010, one of Pete Stanton's neighbors noticed a sport utility vehicle (SUV) pull into Stanton's driveway. Another neighbor noticed the SUV also, and it stood out to him since he knew all his neighbors and had never seen this SUV before. There were four people in the SUV, including defendant, who was the driver. Two of the people got out of the SUV and knocked on the door. When no one answered, they went to a partially opened sliding glass door. One of them entered the house through that door, and then opened the front door for the other person to enter. Defendant backed the SUV out of the driveway, parked on the side of the road, waited there, and then backed into Stanton's driveway. Stanton's neighbor called the police to

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<sup>1</sup> All further statutory references will be to the Penal Code, unless otherwise noted.

report what he had observed. As Officer Joseph Silva was driving up the street, defendant pulled out of the driveway and tried to drive away. Officer Silva motioned for him to pull over and yelled at him to stop. Even though defendant made eye contact with the officer, he did not stop. Officer Silva positioned his car in front of the SUV to force defendant to stop. Defendant got out of the SUV and asked what was going on. He gave Officer Silva a false name and date of birth. Defendant was arrested and booked into jail.

Officer Silva called for backup. As the responding officer, William Spiller, approached the scene, he observed two juveniles running toward a dirt field. One of them was wearing a red shirt. Officer Spiller put out a radio call that two juveniles were “fleeing through the desert,” and proceeded to Officer Silva’s location. Another officer eventually detained the juveniles.

Stanton, who had been away visiting family, returned to his home to find that several items had been moved from his bedroom closet to the front door, including an antique gun and a pellet gun. He also noticed that a set of antique pipes that had been on display in the living room was missing. He later discovered the pipes in a black carrying bag, behind a chest in his bedroom. He also noticed that his coin collection was missing. The coin collection was worth between \$8,000 and \$10,000.

## ANALYSIS

### The Trial Court Properly Denied Defendant’s *Romero* Motion

Defendant argues that the trial court abused its discretion in denying his *Romero* motion to dismiss one or both of his prior strike convictions. He asserts that the court relied on impermissible factors, including the District Attorney Office’s policy on

charging two strikes where both convictions arose from the same case, and defendant's "claim of innocence." He also asserts that his prior strikes were remote in time, arose out of the same occurrence, and involved no weapons or injuries, and that his current offense was minor. He adds that his current conviction involved no weapons or violence, the value of loss was small, and he merely waited outside in a car and was convicted on an accomplice theory. We conclude that the court properly declined to strike either of his prior strikes.

*A. The Trial Court's Ruling*

The defense filed a motion to strike defendant's prior strike convictions, and the People did not file an opposition, but opted to respond orally. The court read the motion and allowed the parties to present oral arguments. Defense counsel argued that it was relevant for the court to consider that both of defendant's strikes were from the same case, which occurred when he was 18 years old. Defense counsel pointed out that some counties "don't even charge three strikes if two of the strikes came in the same case." Defense counsel also asked the court to consider that the case did not involve a threat of violence, that defendant had a supportive family, and that defendant had conducted himself in a "dignified, respectable manner" throughout the proceedings. The prosecution began to point out defendant's prior record, but the court interrupted him, stating that it had just thoroughly reviewed defendant's record. The court instead wanted to hear the prosecutor's view, and the view of the District Attorney's Office, "about the two strikes arising in the same case." The prosecutor asserted that defendant was actually 20 years old when the strike offenses occurred. The prosecutor then stated: "If it was my

view or the office's view that only one strike was appropriate, we would have only alleged one strike. But because of the defendant's prior—the two strikes being violent felonies in and of themselves, the current felony being, I think, the most serious of nonviolent felonies, it is a strike because it's a serious felony.” The prosecutor went on to discuss the current offense. The court responded that it understood the seriousness of a residential burglary, but stated that it was interested in the prosecutor's view on whether the court should exercise its discretion to strike one of the strikes, based on the fact that it arose out of the same course of conduct. The court added, “I know you stated that you look at it as it's two strikes, two victims, two people who are saying—face the same weapon, or experience the same fear of death . . . [a]nd if that's your primary calculus [*sic*] for your position then that's fine. I accept that.” The prosecutor concurred that was his view, and added that when defendant “entered that plea of two separate robbery strikes, [he] knew that any felony could put him in this position where it would be 25 to life . . . .” Next, defendant addressed the court regarding the current offense and said he “never even stepped foot outside of [his] truck” and he “never knew anything about nothing [*sic*] that was going to take place.” With regard to his prior strikes, defendant said he “didn't even rob nobody.” He said that he went into a restaurant and took money that was on the counter, and that he “did [his] time for that.” Defendant also asked the court to consider his current personal circumstances.

The court stated that it “regretfully but very surely” found that defendant came within the spirit of the three strikes law. The court first engaged in an exposition of defendant's criminal history, noting that it was “disturbing.” Defendant's first conviction

was in 1998, when he was convicted of receiving stolen property (Pen. Code, § 496, subd. (a)), a felony. He was placed on probation for three years, but had to serve 180 days in jail. In 1999, he was convicted of misdemeanor unlawful sexual intercourse with a minor (Pen. Code, § 261.5, subd. (c)), and was placed on probation for 60 months. Then, in 2000, defendant was convicted of two counts of second degree robbery (Pen. Code, § 211) and was sentenced to six years in prison. The court noted that he was released on parole and violated his parole at least one time. In 2009, defendant was convicted of driving with a suspended license (Veh. Code, § 14601.1, subd. (a)) and was placed on probation for three years, but also served 10 days in jail. The court finally noted that the current offense occurred in 2010, while defendant had two outstanding bench warrants for driving with a suspended license (Veh. Code, § 14601.1, subd. (a)) and giving a false identification to a peace officer (Pen. Code, § 148.9, subd. (a)).

An additional factor that the court considered was that defendant was apparently not “entirely forthcoming and candid with the probation officer who interviewed him.” The court observed that police records showed that defendant admitted gang involvement as recently as 2010; however, he told the probation officer that his last affiliation with a gang was in 1999. Furthermore, when interviewed by the probation officer, defendant denied responsibility for the current offense or “downplay[ed] his role in it.” The court commented that, from the statement that defendant gave in court, he still was minimizing his involvement in the offense.

Finally, the court noted that defendant was an adult who involved two minors in the burglary. The court remarked, “Being himself responsible for a crime like that is one

thing, but to involve two minors and to stand by while they entered the residence and put themselves at grave risk where the risk of violence is certainly high, is almost unconscionable.” The court then denied the motion to strike.

### B. *Standard of Review*

In *Romero, supra*, 13 Cal.4th 497, the California Supreme Court held that a trial court has discretion to dismiss three strikes prior felony conviction allegations under section 1385. (*Id.* at pp. 529-530.) “[A] trial court’s refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion.” (*People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*)). “[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 377.) “[T]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” [Citations.]” (*Id.* at pp. 376-377.) “[W]here 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.)

### C. *The Trial Court Did Not Abuse Its Discretion*

The touchstone of the *Romero* 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.]" (*Carmony, supra*, 33 Cal.4th at p. 377.)

Here, the record clearly shows that the court considered the proper criteria in making its determination not to strike any of defendant's prior strike convictions. Defendant's recidivist criminal history brings him squarely within the spirit, as well as the letter, of the three strikes law. His criminal history dates back to 1998, when he was first convicted of receiving stolen property. He spent 180 days in jail and then was placed on probation for three years. While on probation, he was convicted of unlawful sexual intercourse with a minor. He was placed on probation again, for 60 months, but less than a year later, committed his two strike offenses (robbery). He then spent six years in prison. He apparently violated his probation in April 2009, and then in August 2009, he was convicted of driving with a suspended license. Furthermore, defendant committed the current burglary in 2010, while he had two outstanding bench warrants.

During his criminal history, defendant was given numerous chances to change by being placed on probation, but he violated his grants of probation. Moreover, he had very brief periods of time between convictions. Although his current offense was nonviolent, when viewed in context with his criminal history, it is evident that defendant continues to present a danger to society. Furthermore, he involved juveniles in the current offense, and placed them in a potentially dangerous situation. In short, the record demonstrates

defendant's continuous criminal conduct, undeterred by repeated grants of probation and incarcerations.

Defendant claims that the court relied on improper considerations in denying his motion. First, he contends that the court "focused on whether striking one or two prior offenses arising from the same case agreed or disagreed with the policy of the District Attorney's Office," and that "[b]y accepting the District Attorney's 'policy' in this regard, the trial court failed to exercise its own independent discretion, constituting an abuse of discretion." The record clearly reflects that the court was merely eliciting a response from the prosecutor to defense counsel's criticism of the district attorney's charging policy concerning strikes that arise from one case. Defendant further claims that the court improperly speculated about the use of weapons in the prior strikes. However, nothing in the record indicates that the court relied on the district attorney's policy, or speculation regarding the prior offenses, in denying the motion to strike.

Second, defendant argues that the court improperly relied on his "claim of innocence." The court did remark on defendant's denial of responsibility in the current offense; however, it only did so in the context of noting that defendant was not "entirely forthcoming and candid with the probation officer who interviewed him." In any event, defendant fails to explain how this consideration would shed any light on his history of recidivist criminal behavior.

In view of the record, we cannot say that the court's decision not to dismiss any of defendant's prior strike convictions was "so irrational or arbitrary that no reasonable

person could agree with it.” (*Carmony, supra*, 33 Cal.4th at p. 377.) We find no abuse of discretion.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST  
Acting P. J.

We concur:

McKINSTER  
J.

RICHLI  
J.