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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.

TOBIN CHRISTOPHER ROBERTS,

Defendant and Appellant.

E054532

(Super.Ct.No. RIF10001589)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Jeffrey Prevost, Judge.

Affirmed in part and reversed in part.

Marilee Marshall, 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, and William M. Wood and Heather F. Crawford, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant and appellant Tobin Christopher Roberts of, among other crimes, kidnapping to commit robbery (count 1; Pen. Code, § 209, subd. (b)(1))¹ and active participation in a criminal street gang (count 4; § 186.22, subd. (a)). On appeal, he challenges the sufficiency of the evidence to support the convictions on these counts. He further contends the trial court erred in failing to dismiss a prior strike allegation pursuant to section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

In light of the recent decision by the California Supreme Court in *People v. Rodriguez* (2012) 55 Cal.4th 1125 (*Rodriguez*), we will reverse the conviction on count 4. We reject defendant's remaining arguments and otherwise affirm the judgment.

II. FACTUAL AND PROCEDURAL SUMMARY

A. *Facts Pertaining to Kidnapping to Commit Robbery*

Maurice Pivonka lives in Moreno Valley. On the morning of March 24, 2010, Ralph Hardy, one of Pivonka's neighbors, was leaving his house to drive to the store. He saw a man he did not recognize near a gate that separated Pivonka's backyard from the street. Hardy knew there had been burglaries in the area and became suspicious of the man. He called his son, who lives next door to Pivonka, and told him to call the police. The son called 911. A Riverside County Deputy Sheriff responded to the call, but had trouble finding Pivonka's house because he had been given the wrong house number.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Meanwhile, Pivonka had been in his backyard cleaning a sprinkler head. He heard a sound and looked toward a block wall separating his yard from the street. He saw defendant running toward him from the wall. Defendant was wearing gloves and pointing a .357 Magnum handgun at him. (Pivonka is an Air Force veteran and familiar with different kinds of handguns.) Defendant told Pivonka to “[g]et on the ground.” Pivonka did so because he was afraid of being shot.

Defendant asked Pivonka if there was anyone in the house. Pivonka said “[n]o.” Defendant then forced Pivonka into the house through a sliding glass doorway. Defendant was behind Pivonka, holding a gun in Pivonka’s back. The doorway is about 25 to 40 feet from the point where defendant first approached Pivonka.

Hardy’s son (the person who called 911) looked out from an upstairs window and saw the suspect in Pivonka’s house holding a large gun.

There is a large gun safe inside Pivonka’s house. Opening the safe requires both keys and a combination. Defendant told Pivonka, “I want the keys to the safe.” Pivonka told him he did not have the keys. Defendant asked for the keys several times and Pivonka eventually told him the keys were at his son’s house. Defendant then hit Pivonka in the back of his head with the barrel of the gun. Pivonka blacked out and hit the floor. At this point, Pivonka was about 10 feet from the sliding glass door through which they entered.

Pivonka was semiconscious for two or three minutes. Defendant again asked for the keys to the safe. Pivonka told him they were in the cupboard in the garage.

Defendant moved Pivonka about 15 to 20 feet to a place in front of a bathroom door.

Defendant hit Pivonka on the head again. Pivonka blacked out for a second or two and fell to the floor.

As defendant went into the garage, he asked Pivonka to tell him where the light switch was located. Pivonka told him it was at the edge of the doorjamb, where the garage door opener was located. Pivonka hoped defendant would open the garage door, exposing himself to the neighbors. Defendant hit the garage door opener, but opened it only partway before stopping it and bringing it back down. Defendant again asked for the location of the light switch, and Pivonka told him. Defendant turned on the garage lights. He searched a cupboard, but did not find any keys. He hit Pivonka on the head again.

Defendant then asked Pivonka for the combination to the safe. Pivonka told him a combination, but not the one that would open the safe. Defendant moved Pivonka 15 feet to a point closer to the safe.

At some point, defendant told Pivonka: ““You’ve got to remember me. I was the guy that broke into your house and stole your computer.”” Indeed, Pivonka’s house had been burglarized six months earlier when a computer and other items were taken.

After defendant was unable to open the safe with the combination he had been given, he pointed the gun at Pivonka and said: ““Give me that combination or I’m going to kill you.”” Pivonka believed he would be killed even if he gave defendant the

combination. He told defendant: ““You kill me and you’re not going to get the combination.””

As defendant pointed the gun at Pivonka’s head, he suddenly asked: “What did you do?” He then jumped up and ran out the door and into the backyard. Pivonka then noticed a policeman at his back gate. The entire incident lasted 20 to 30 minutes.

B. Facts Pertaining to Defendant’s Active Participation in a Criminal Street Gang

Riverside County Sheriff’s Detective Lance Colmer testified as a gang expert for the prosecution. He is familiar with the Edgemont criminal gang. Edgemont merged with other gangs in 2003, include Dorner Blocc and Young Paper Chasers (YPC). It is now known as Dead End, Dead End Yard, or simply, Edgemont. The gang members use various symbols to represent the gang in graffiti and on clothing. They will also use hand signals as gang signs. It has 150 to 175 active members.

The parties stipulated that as of the date of the Pivonka burglary, members of Edgemont, YPC, and Dead End Yard engaged in a pattern of criminal activity within the meaning of section 186.22.

Detective Colmer testified that the primary activities of the Edgemont gang are residential and school burglaries, and drug sales. Acquiring guns is extremely important to the gang and residential burglaries are a primary means of obtaining guns for the gang. Home invasion robberies are committed by members of the gang, but they are less frequent than their primary activities.

Detective Colmer opined that defendant is an active member of the Edgemont gang based on defendant's tattoos, his admissions to being a gang member, his repeated contacts with other active gang members, his length of time within the gang, the presence of other gang members at defendant's preliminary hearing (in an apparent show of support), and his commission of the residential burglary in this case.

On cross-examination, Detective Colmer stated that it was possible that a person could do a home invasion robbery for their own personal benefit, not to further or promote a gang. He had no knowledge that an Edgemont gang member told defendant to do the home invasion robbery, that defendant had bragged about committing this crime, that gang members were happy that defendant committed this crime, or that defendant gained any street credibility or was rewarded for this crime.

There was no evidence that someone acted with defendant in committing the crimes in this case.

C. Relevant Procedural History

A jury convicted defendant of: kidnapping to commit robbery (count 1; § 209, subd. (b)(1)); attempted first degree robbery (count 2; §§ 664, 211); residential burglary (count 3; § 459); active participation in a criminal street gang (count 4; § 186.22, subd. (a)); assault with a firearm (count 5; § 245, subd. (a)(2)); being a felon in possession of a firearm (count 6; § 12021, subd. (a)(1)); and causing injury to an elderly person (count 7; § 368, subd. (b)(1)). The jury found defendant not guilty of one count of first degree burglary pertaining to an alleged burglary in November 2009.

The jury also found true the following enhancement allegations: as to counts 1 and 2, defendant personally used a firearm (§ 12022.53, subd. (b)) and committed the offenses against a person over the age of 65 (§ 667.9, subd. (a)); as to counts 3, 5, and 7, defendant personally used a firearm (§ 12022.5, subd. (a)); and as to counts 2, 3, 5, and 7, defendant personally inflicted great bodily injury upon Pivonka, a person 70 years or older (§ 12022.7, subd. (c)).

In a bifurcated trial, defendant admitted the allegations that he: had been convicted in September 2008 of being a felon in possession of a firearm (§ 12021, subd. (a)(1)) for purposes of section 667.5, subdivision (b); had been convicted in August 2008 of first degree burglary (§ 459), a serious felony within the meaning of section 667, subdivision (a); and had one prior strike conviction—the August 2008 first degree burglary conviction—for purposes of sections 667, subdivisions (c) and (e)(1), and 1170.12, subdivision (c)(1).

Defendant was sentenced to 14 years to life, plus 39 years four months.

III. ANALYSIS

A. *Sufficiency of the Evidence of Asportation for Kidnapping to Commit Robbery*

Defendant contends the evidence is insufficient to support the asportation requirement for the crime of kidnapping to commit robbery. (§ 209, subd. (b).) We disagree.

Defendant was convicted of kidnapping to commit robbery under section 209. Subdivision (b)(1) of that statute provides: “Any person who kidnaps or carries away any

individual to commit robbery . . . shall be punished by imprisonment in the state prison for life with the possibility of parole.” The asportation element of kidnapping for robbery requires that the movement of the victim (1) not be merely incidental to the commission of the robbery, and (2) increases the risk of harm over and above that necessarily present in the crime of robbery. (*In re Earley* (1975) 14 Cal.3d 122, 127; *People v. Daniels* (1969) 71 Cal.2d 1119, 1139; § 209, subd. (b)(2).)² “These two elements are not mutually exclusive but are interrelated.” (*People v. Vines, supra*, 51 Cal.4th at p. 870.)

Under the first prong, the “jury considers the ‘scope and nature’ of the movement, which includes the actual distance a victim is moved. [Citations.] There is, however, no minimum distance a defendant must move a victim to satisfy the first prong. [Citations.]” (*People v. Vines, supra*, 51 Cal.4th at pp. 870-871.) Moreover, “the fact that the movement of a robbery victim *facilitates* a robbery does not imply that the movement was merely incidental to it.” (*People v. James* (2007) 148 Cal.App.4th 446, 454.) Indeed, if the movement is “substantial,” it is not merely incidental even if it occurred solely to facilitate the robbery. (*In re Earley, supra*, 14 Cal.3d at p. 130; *People v. James, supra*, at p. 454.) A “movement of the victim that is *necessary* to the robbery

² Prior to 1997, the so-called “*Daniels* test” required a “*substantial* increase in risk of harm above and beyond that inherent in the robbery.” (*People v. Rayford* (1994) 9 Cal.4th 1, 13, italics added.) In 1997, the Legislature eliminated the requirement that the increase in risk of harm caused by the movement of the victim be substantial. (*People v. Vines* (2011) 51 Cal.4th 830, 869, fn. 20; *People v. Robertson* (2012) 208 Cal.App.4th 965, 979-982.)

might or might not be merely incidental, based on the circumstances”; but if it is not necessary, it is not incidental. (*People v. James, supra*, at pp. 454-455 & fn. 6.)

Under the second prong, the question is whether the movement subjects the victim to an increase in risk of harm above and beyond that inherent in the robbery. (§ 209, subd. (b)(2); *People v. James, supra*, 148 Cal.App.4th at p. 455.) “This includes consideration of such factors as the decreased likelihood of detection, the danger inherent in a victim’s foreseeable attempts to escape, and the attacker’s enhanced opportunity to commit additional crimes. [Citations.] The fact that these dangers do not in fact materialize does not, of course, mean that the risk of harm was not increased.” (*People v. Rayford, supra*, 9 Cal.4th at pp. 13-14; see also *People v. Vines, supra*, 51 Cal.4th at p. 870.)

It is apparent from the record that defendant’s sole or primary goal was to rob Pivonka of the contents of his gun safe. To do this, he needed the key and combination to the safe, which he believed he could get from Pivonka. Defendant initially forced Pivonka to the ground in Pivonka’s backyard. From there, he moved Pivonka into the house, some 25 to 40 feet away. Once inside, defendant used force to get Pivonka to tell him the combination and the whereabouts of the key. Although moving him inside the house undoubtedly *facilitated* defendant’s efforts to open the safe, the move was not *necessary* to commit the robbery. Pivonka was needed only for his knowledge about the keys and combination. Defendant could have asked Pivonka for this information while he was in the backyard (i.e., without moving him). Moving him was, therefore, not

necessary to commit the robbery. Because the move was not necessary, it was not merely incidental to the robbery. (See *People v. James, supra*, 148 Cal.App.4th at pp. 454-455 & fn. 6.)

Regarding the second prong, *People v. Jones* (1999) 75 Cal.App.4th 616, is instructive. In that case, the defendant grabbed a woman in a parking lot, covered her mouth with his hand, and took her wallet, keys, and pager from her. (*Id.* at p. 622.) He then walked her to her car, about 25 to 40 feet away. When she could speak, the victim said “[p]lease don’t hurt me, just take everything.” The defendant said, ““I plan on it.”” (*Ibid.*) The victim opened the car door, causing the car alarm to sound. The defendant pushed the victim into the car and then got into the driver’s side. The woman was able to escape out the passenger door. (*Ibid.*) The Court of Appeal affirmed the kidnapping for robbery conviction. The court explained: “The critical factor which substantially increased the risk of harm to [the victim] occurred when he forced her to move the 40 feet in order to then push her into her car. Although the car alarm was sounding, once he pushed her into the car, she was no longer in public view as when she was in plain sight with [the defendant] holding his hand over her mouth—a situation which would have aroused concern immediately in any onlookers.” (*Id.* at pp. 629-630.)

Like the move across the parking lot and into the car in *Jones*, moving Pivonka from his backyard into the house took him out of the potential view of others. Although Pivonka’s backyard was not a public parking lot, there is evidence that neighbors could see into Pivonka’s backyard. By moving Pivonka inside, it was less likely defendant’s

crime would be detected, and therefore increased the risk of harm. (See *People v. Shadden* (2001) 93 Cal.App.4th 164, 170 [moving the victim from the front of a store to the back of the store “made it less likely for others to discover the crime and decreased the odds of detection”]; *People v. Aguilar* (2004) 120 Cal.App.4th 1044, 1049 [moving victim from an illuminated area to a dark area where they could not be seen increased the risk of harm by decreasing the likelihood of detection].) Certainly, it would have been easier for Pivonka to be heard by others if he had not been moved from the backyard. (See *In re Lokey* (1974) 41 Cal.App.3d 767, 769-770, 772 [asportation increased risk of harm because victim was moved from a place where her screams could be overheard].)

Moreover, moving Pivonka from the backyard into the house, where defendant could remain close to him, limited his ability to escape and thereby further increased the risk of harm. (See *People v. James, supra*, 148 Cal.App.4th at p. 457 [moving victim from outside of bingo club to inside the club reduced the prospects of detection or escape]; *People v. Robertson* (2012) 208 Cal.App.4th 965, 985 [moving victim away from back door of garage reduced possibility she could escape].)

Based on the foregoing, there is sufficient evidence of the asportation requirements for kidnapping to commit robbery.

B. *Sufficiency of the Evidence of Active Participation in a Criminal Street Gang*

Section 186.22, subdivision (a), imposes punishment for “[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes,

further, or assists in any felonious criminal conduct by members of that gang” The elements of the offense are: “(1) active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; (2) knowledge that the gang’s members engage in or have engaged in a pattern of criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang.” (*People v. Albillar* (2010) 51 Cal.4th 47, 56.)

Defendant does not challenge the sufficiency of the evidence of the first two elements; he contends the evidence is insufficient to support the third element—that he willfully promoted, furthered, or assisted in felonious criminal conduct by members of the gang in which he actively participates. In this case, the felonious criminal conduct relied upon by the prosecution is the conduct at Pivonka’s house that gave rise to the crimes alleged in this case.

Defendant correctly points out that there is no evidence that he acted with anyone else in committing the crimes in this case. He argues that assisting felonious criminal conduct requires more than one participant, and that promoting or furthering such conduct requires the commission of a felony by other members of the gang. Therefore, he concludes, there is no evidence that defendant promoted, furthered, or assisted in felonious criminal conduct by gang members.

In their respondent’s brief, the Attorney General does not dispute defendant’s point that he acted alone in this case. However, the Attorney General asserts that the “current state of the law . . . is that there is no requirement that the conduct subject to

section 186.22, subdivision (a), be the work of more than one gang member.” The Attorney General points to *People v. Salcido* (2007) 149 Cal.App.4th 356 (*Salcido*) and *People v. Sanchez* (2009) 179 Cal.App.4th 1297 [Fourth Dist., Div. Two] (*Sanchez*) as decisions in which Courts of Appeal held that section 186.22, subdivision (a), applies to a defendant acting alone.

After the briefs were filed in this appeal, the California Supreme Court decided *Rodriguez*.³ In *Rodriguez*, the defendant acted alone in committing an attempted robbery. (*Rodriguez, supra*, 55 Cal.4th at p. 1128.) He was convicted of attempted robbery and active participation in a criminal street gang under section 186.22, subdivision (a). (*Rodriguez, supra*, at p. 1129.) The issue in *Rodriguez*, like the issue raised by defendant in the present case, was whether the third element of the crime described in section 186.22, subdivision (a)—willfully promoting, furthering, or assisting in any felonious criminal conduct by members of the defendant’s gang—can be satisfied by felonious criminal conduct committed by the defendant acting alone. (*Rodriguez, supra*, at p. 1129.) The court held that it does not, and expressly disapproved of *Salcido* and *Sanchez* to the extent they are inconsistent with *Rodriguez*.⁴ (*Rodriguez, supra*, at p. 1137.)

³ Both parties acknowledged in their briefs that the California Supreme Court was considering, in *Rodriguez*, the issue raised by defendant.

⁴ The *Rodriguez* decision is comprised of a lead opinion by Justice Corrigan, in which Justices Werdegar and Liu concurred (the lead opinion), a concurring opinion by Justice Baxter, and a dissent by Justice Kennard, in which Chief Justice Cantil-Sakauye and Justice Chin concurred. The lead opinion is based primarily on two grounds. First, [footnote continued on next page]

The *Rodriguez* court began by analyzing the statute according to its “plain, commonsense meaning.” (*Rodriguez, supra*, 55 Cal.4th at p. 1131, quoting *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 519.) The felonious criminal conduct referred to in the statute must be committed “by members of that gang.” (*Rodriguez, supra*, at p. 1131, quoting section 186.22, subd. (a).) The word “members,” the court explained, is a plural noun. (*Rodriguez, supra*, at p. 1132.) Therefore, “the plain meaning of section 186.22[, subdivision] (a) requires that felonious criminal conduct be committed by at least two gang members, one of whom can include the defendant if he is a gang member.” (*Ibid.*) Because the defendant acted alone, he did not violate section 186.22, subdivision (a). (*Rodriguez, supra*, at p. 1139.)

Rodriguez controls the outcome of the question raised by defendant in this case. Because defendant acted alone in committing his crimes against Pivonka—the only crimes the prosecution relied on to support the third element of the gang participation count—there is insufficient evidence to support the conviction on that count. Accordingly, we will reverse the conviction on that count.

[footnote continued from previous page]

the plain meaning of the phrase “members of that gang” requires the felonious criminal conduct be committed by at least two gang members. (*Rodriguez, supra*, 55 Cal.4th at p. 1132.) Second, requiring at least two gang members “reflects the Legislature’s attempt to avoid any potential due process concerns that might be raised by punishing mere gang membership.” (*Id.* at p. 1133, fn. omitted.) Justice Baxter, in his concurring opinion, agrees with the first ground, but writes separately “[b]ecause there is no need to consider the constitutional implications of a contrary construction” (*Id.* at p. 1140 (conc. opn. of Baxter, J.).)

C. *Romero Motion*

Defendant admitted a prior strike conviction for first degree burglary. (§§ 459, 667, subds. (c), (e)(1), 1170.12, subd. (c)(1).) Prior to sentencing, defendant invited the court to exercise its discretion to dismiss the strike allegation pursuant to section 1385 and *Romero, supra*, 13 Cal.4th 497. Defendant relied primarily on his lack of a supportive family life as a child. He argued that he is outside the spirit of the “Three Strikes” law because he “is a young man that made poor choices that stems [*sic*] from his upbringing.” Following argument, the court declined to do so. Although the court acknowledged the “difficult odds” facing defendant in light of his rough upbringing, the court concluded that while his “bad background certainly contributes to such behavior [e.g., using controlled substances and ‘running with a gang’],” it is “not an excuse for it.”

On appeal, defendant argues that the court’s decision constitutes an abuse of discretion. We disagree.

The “Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict courts’ discretion in sentencing repeat offenders.” (*Romero, supra*, 13 Cal.4th at p. 528.) The trial court’s discretion to strike a qualifying strike is therefore guided by “established stringent standards” designed to preserve the legislative intent behind the Three Strikes law. (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) “[T]he court . . . 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.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

A court's refusal to dismiss a prior strike conviction is reviewed for an abuse of discretion. (*People v. Carmony, supra*, 33 Cal.4th at p. 374.) The court will abuse its discretion only if its refusal to dismiss the prior strike “is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 377.) However, a reviewing court will find an abuse of discretion when the factual findings critical to the trial court's decision have no support in the evidence. (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998.) The defendant has the burden of demonstrating that the court's decision was irrational or arbitrary. (*People v. Carmony, supra*, at p. 376.)

In addition to his “extremely rough upbringing,” defendant points out that he was 21 years old at the time of sentencing and that even without the strike, he “would still be required to serve a substantial determinate sentence, plus a life sentence,” with the possibility of parole only if the Board of Parole Hearings found him suitable. Such a nonstrike sentence, he asserts, “could have been adequate in this case.” Based on his “young age, background, and the fact that [he] was already facing a life sentence,” defendant argues, “the court should have struck the prior.”

The court's decision was not an abuse of discretion. The probation officer's report reveals a history of criminal activity beginning when defendant made a criminal threat (Pen. Code, § 422) at the age of 13. He thereafter twice ran away from juvenile facilities;

in 2005, at the age of 15, he committed burglary (Pen. Code, § 459), vehicle theft (Veh. Code, § 10851, subd. (a)), and resisted arrest (Pen. Code, § 148, subd. (a)(1)). At 16 years of age, he committed another burglary (Pen. Code, § 459). At 17, he was found carrying a concealed firearm in violation of Penal Code, former section 12025, subdivision (a)(3). In 2008, as an adult, he had been convicted of first degree burglary (Pen. Code, § 459), possessing controlled substances (Health & Saf. Code, § 11350, subd. (a)), vehicle theft (Veh. Code, § 10851, subd. (a)), and being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1)).

He committed the offenses in this case less than seven months after being released from prison on parole.

In light of this history, the probation officer reported that it “does not appear previous grants of probation and parole, coupled with juvenile placement opportunities, have altered [defendant’s] mindset and the level of his criminal actions have escalated.” Although the probation officer acknowledged that defendant has “experienced a difficult childhood,” she concluded that he is “a threat to society and he apparently has little desire or motivation to alter his illicit lifestyle.”

Defendant’s lengthy criminal history, the short time he had been out of prison before committing the current crimes, and the violent nature of the present felonies amply support the court’s exercise of discretion in this case to deny defendant’s *Romero* motion.

IV. DISPOSITION

The judgment is affirmed in part and reversed in part. The judgment of conviction on count 4 for active participation in a criminal street gang is reversed. The trial court is directed to modify defendant's sentence accordingly and deliver a certified copy of an amended minute order and amended abstract of judgment, each reflecting the modification of the sentence, to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

RAMIREZ
P. J.

RICHLI
J.