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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.

ANTHONY WAYNE LUCAS,

Defendant and Appellant.

E054717

(Super.Ct.No. FWV1000278)

OPINION

APPEAL from the Superior Court of Riverside County. David B. Downing,
Judge. Affirmed.

Nancy J. King, 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 James D. Dutton and
Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant Anthony Wayne Lucas was convicted of residential burglary. (Pen. Code, § 459.¹) In a bifurcated proceeding, the trial court found true the allegation that he suffered two prior strike convictions (§§ 1170.12, subs. (a)-(d), 667, subs. (b)-(i)), two prior serious felony convictions (§ 667, subd. (a)(1)), and served three prior prison sentences (§ 667.5, subd. (b)). He was sentenced to state prison for a total term of 35 years to life. He appeals, contending the trial court erred in refusing to instruct the jury on the lesser related offenses and to strike his priors. Finding no errors, we affirm.

I. FACTS

Around 9:30 a.m. on January 25, 2010, Kyle Smolinski was awakened by someone knocking on the door to his Rancho Cucamonga home. Believing it was a salesperson, he ignored it. Suddenly, he heard loud bangs as someone kicked the front door open and then entered Smolinski's bedroom. Smolinski identified defendant as the person who entered his room. As Smolinski yelled at defendant, who looked shocked, defendant ran out of the house and drove away in his wife's car. Defendant's entry and exit of Smolinski's house was recorded on a surveillance video. Defendant stipulated that he was the person in the video and that the car depicted in the video in which he drove away was registered to his wife.

Defendant was arrested approximately nine days after the incident. He initially denied being the person who broke into the house, even when confronted with the

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

surveillance video. However, after being told he was being charged with residential burglary, he responded, “I did not steal anything.” Defendant offered no reason for being in Smolinski’s home.

Sonia Lucas, defendant’s wife, testified that she had married defendant two times. During the first marriage, she had a child by another man, which ended the marriage. After remarrying defendant, they had a child together; however, defendant remained suspicious of his wife’s actions. The two would fight over defendant’s access to dating services and porn sites on the internet. In response, Mrs. Lucas would attempt to make defendant jealous. Around the same time, the couple had been looking for foreclosed or distressed properties for purchase in the San Bernardino Sun newspaper. One morning, Mrs. Lucas decided to play a “childish” prank. She took a random address out of the public notices section of the paper, wrote it on a piece of paper, drew little hearts on it, and left it on the table for defendant to see. After defendant’s arrest, Mrs. Lucas told the investigator about the prank.

On cross-examination, while Mrs. Lucas was watching the surveillance video, she asked, “Why did my husband do that? Why would he do something like that?” At trial, Mrs. Lucas no longer had the note with the address on it. Instead, she produced a newspaper published on September 14, 2010, nearly eight months after the date of defendant’s offense, with Smolinski’s address in it.

II. INSTRUCTING ON LESSER RELATED OFFENSES

According to defendant, the only issue for the jury to decide was whether he entered Smolinski’s house with the intent to commit a theft. During their discussion

about jury instructions, defense counsel requested instructions on trespass (§ 602.5, subd. (b)) and forcible entry/vandalism (§ 603). The prosecution objected to instructing the jury on forcible entry/vandalism. The trial court observed there was no evidence why defendant forced his way into Smolinski's home; "[h]e ha[d] no tools, he ha[d] no bag to throw property in." The prosecution replied that defendant used his body, specifically his leg, as his weapon; however, if he did not intend to commit a theft and he was there because of jealousy, then instructing the jury on criminal threats (§ 422) would be proper.

In response, the court noted defendant never said anything to Smolinski that could be considered a threat, i.e., "I'm going to kill you." "So . . . I don't know what the jury will do with it. The only person who provides a motive is Mrs. Lucas. The motive is his anger. He thinks she's in there with some other guy and he kicks down the door because he wants to find out. That's what the defense's motive [is]. You never claimed this as a 603, [defense counsel]. You want a 603 verdict so the priors don't kick in. I understand that part, but you haven't shown that either. [¶] If the jury believes that he went there because he thought his wife was inside, they're going to acquit him, they're going to give him a pass because it wasn't for theft. If the jury doesn't believe that, they're going to convict him of burglary in the first degree. [¶] [F]rom my looking at the evidence, I think this is all or nothing; it is or it isn't. There's no lessers. It's guilty or not guilty or hung. I don't know about that. I think that's where we're at. I don't think there's any reasonable lesser on these facts, given these facts. [¶] So I'm not going to give 603 because I don't think it applies factually. The defense has a great argument to the jurors. 'Hey folks, what evidence is there of theft? It's a theory. The D.A.'s theory. Nothing

else. Nothing more, nothing less.’ And the D.A. gets up in rebuttal and says, ‘Folks, do you really believe Ms. Lucas was telling the truth about the newspaper?’ . . . I don’t see any lessers. I think that’s all there is here. [¶] So I decline to give a lesser instruction on anything. I don’t think it fits. I think that . . . the defendant’s guilty of the greater offense or he’s guilty of nothing.”

On appeal, defendant contends the trial court erred in refusing to instruct the jury on the lesser related offenses of trespassing and forcible entry vandalism. He further claims the error amounts to a denial of his federal constitutional right to instruction on his defense theory such that his conviction must be reversed.

Generally, the trial court must instruct sua sponte on general principles of law relevant to issues raised by evidence presented at trial (*People v. Blair* (2005) 36 Cal.4th 686, 744); that is, “principles closely and openly connected with the evidence adduced before the court which are necessary for the jury’s proper consideration of the case.” (*People v. Iverson* (1972) 26 Cal.App.3d 598, 604, overruled on another point in *In re Earley* (1975) 14 Cal.3d 122, 130, fn. 11.) This requirement applies only to general principles necessary for the jury’s understandings and not to pinpoint instructions for a particular case. (*People v. Flannel* (1979) 25 Cal.3d 668, 680-681.)

In *People v. Birks* (1998) 19 Cal.4th 108, 136, the California Supreme Court held that a defendant has no right to an instruction on a lesser related offense. *Birks* reasoned that a lesser included offense is subsumed by the charged crime, and as such, is a “general principle of law” that requires instruction to the jury. (*Id.* at p. 118.) However, a lesser related offense was deemed not to be one of those general principles to warrant a

court's duty to instruct absent a request. (*Ibid.*) *Birks* concluded it was up to the prosecution to charge a lesser related offense as an alternate charge. (*Id.* at p. 129.) Since the prosecution has the right to decide what charges to try, it has no obligation to charge a lesser related offense even if supported by the evidence. (*Ibid.*)

Neither the state nor federal Constitution requires the trial court to instruct on uncharged lesser related offenses, even if requested by the defense. (*People v. Foster* (2010) 50 Cal.4th 1301, 1343; *People v. Schmeck* (2005) 37 Cal.4th 240, 292 [“a trial court has no duty to instruct on an uncharged lesser related offense when requested to do so by the defendant [citation]”]; *Hopkins v. Reeves* (1998) 524 U.S. 88, 96-97; *People v. Hall* (2011) 200 Cal.App.4th 778, 782 [“The ultimate decision of whether to give an instruction on an uncharged lesser related offense should not be removed from the trial court.”].) In *People v. Foster, supra*, the court held the trial court committed no error in failing to instruct the jury sua sponte on a lesser related crime of trespass where defendant was charged with burglary. “Regardless of defendant’s legal and factual theories concerning how his conduct may have constituted trespass, that potential crime nonetheless remains at most a lesser offense related to (but not included in) the offense of burglary.” (*Id.* at p. 1344.)

According to the relevant case authority, regardless of whether the parties below agree on an instruction on a lesser related offense, the trial court is only required to give such instruction where substantial evidence adduced at trial supports doing so. Here, the court acted appropriately in refusing to instruct the jury on trespass or forced entry vandalism as lesser related offenses of residential burglary, because there was insufficient

evidence that defendant's intent in entering the residence was anything other than an intent to steal. Although defendant, via his wife's testimony, attempted to posit a theory that he entered the residence expecting to finding his wife and/or her lover, the objective facts fail to support such theory. Defendant used his wife's car to go to Smolinski's home and did not declare who he was or why he was at the front door when knocking. Upon breaking into the home, defendant entered the bedroom, and when confronted with Smolinski, defendant looked "shocked" and immediately left. He did not accuse Smolinski of being involved with Mrs. Lucas. Defendant did not try to explain why he had broken into Smolinski's home. Rather, like a child caught with his hand in the cookie jar, he ran off without a word of explanation. To have accepted defendant's theory that he was a jealous husband, the trial court would have had to reject the prosecution's evidence. (*People v. Santos* (1990) 222 Cal.App.3d 723, 739.) Thus, the trial court acted within its discretion in determining that insufficient evidence supported instructing the jury on trespass or forced entry vandalism.

Even if we assume the trial court erred in failing to instruct on a lesser related offense, the error was harmless. The Constitution of the State of California reads in part, "No judgment shall be set aside . . . on the ground of misdirection of the jury . . . unless, after an examination of the entire cause . . . the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) Defendant contends the failure to give his requested instructions deprived him of his right to due process and his right to adequate instruction on his defense theory. However, the United States Supreme Court has expressly refrained from recognizing a constitutional

right to instructions on lesser included offenses in noncapital cases, and therefore, the California rule of sua sponte instructions is independent of federal law. (*People v. Breverman* (1998) 19 Cal.4th 142, 168-169.) Thus, the *Watson* test applies when a defendant argues that reversal is warranted by a trial court's failing to instruct the jury on a "general principle of law." *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*) states that a "'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause . . . ' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Id.* at p. 836.) *People v. Seden* (1974) 10 Cal.3d 703, overruled in part on another point in *People v. Blakeley* (2000) 23 Cal.4th 82, 89, held that even if "an instruction on a lesser included offense was erroneously omitted, the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions," then the prejudicial effect of such failure may be deemed harmless if it "reasonably appears from the verdict and the instructions given that the jury rejected the evidence tending to prove the lesser offense." (*People v. Seden, supra*, 10 Cal.3d at p. 721.)

In the present case, the factual question is defendant's intent upon entering Smolinski's home. According to the defense theory, defendant broke into Smolinski's home because defendant was a jealous husband whose wife had previously cheated on him, giving birth to another man's child. Thus, counsel argued that defendant may be guilty of vandalism or trespass, but since the only crime charged was burglary, the sole issue for the jury to decide was whether defendant had the intent to steal. At the

conclusion of his closing argument, counsel argued that the prosecution failed to “prove his case beyond a reasonable doubt.” Rejecting counsel’s argument and Mrs. Lucas’s testimony, the jury found defendant had the requisite intent to steal and found him guilty of burglary. Based on these findings, it is not probable that defendant would have received a more favorable result even if the lesser related instructions were read. The jury was well within its power to reject the prosecution’s theory of the case and acquit the defendant. Nonetheless, the jury necessarily rejected the defense theory. For these reasons, defendant’s contentions fail on the merits, as any perceived judicial error was harmless.

III. MOTION TO STRIKE PRIORS

Defendant moved to dismiss a “strike” under section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. At the hearing on the motion, the trial court indicated it would strike defendant’s 2000 burglary conviction if allowed to do so. Defendant’s 2000 burglary conviction involved his wife’s initial infidelity that resulted in the birth of defendant’s stepson. Defendant thought his wife was still having an affair with the victim, and thus, he went to the victim’s home, saw the door open, walked in, and took the victim’s wallet. Regarding the three strikes law, the court did not hesitate to state it did not favor the law.² Regarding defendant and his priors, the court said, “If I

² “I don’t like it. I think it’s [D]raconian. Goes way too far. And I’m entitled to my personal opinion because this is a person, and my personal opinion is entitled. The problem is that my personal opinion hasn’t anything to do with what I have to do as a judge.” Later on, the court continued, “The three strikes is [D]raconian, I don’t like it. I don’t like having to deal with it, but the law requires me to do it. But I don’t think it’s

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had my way, I'd strike one of the strikes and sentence [defendant]." However, the court recognized it was required to follow the law and that defendant was a repeat offender. The court summarized defendant's criminal background: "[Defendant] had been to prison twice before he committed the first degree burglary in 2000, which is his first strike. ¶ And then after that, he goes to prison in 2000, for the first. He gets out, there is a parole violation, for what we don't know. In May of '07, he's convicted of receiving stolen property. And while he's out on bail on the stolen property case, he picks up the 245. And then he's out of prison on that case, he picked up this case. So, he is a repeat offender for which the three strikes law was designed."

The court recognized that convictions that are 20 or 30 years old may be stricken; however, it was still required to consider whether defendant had "led a blameless life" between strikes. As for defendant, the court observed: "Had the defendant just committed the first degree burglary in 2000, and had no other offense between now and this crime, I probably would strike that strike. Probably would. ¶ But the problem is, he didn't—he had two previous prison commitments before it, and at least two after it, one of them being a parole violation. [H]e hasn't led a legally blameless life. So, therefore, I can't—then I have to find whether he fell within or without the three strikes law. Was he a person who should fall under the three strikes law or not. And that's the

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fair. I don't think this case is worth 30-odd years in prison. I think that's [D]raconian. I think it's too much. On the fact of this offense, on this case alone, standing alone, but the problem with three strikes is exactly what it says, punishing defendant for his background of what he had done before, such as the new crime. That's the problem with it, and it's upheld by the court and the Court of Appeals enforces it."

question. That was—where by his prospects, character and background and character outside the scheme and spirit and to show that. He can't show it. I can't show it because it doesn't exist.”

Noting that recently this court had reversed the trial court's decision to strike a prior and sentence the defendant to 18 years, the court observed: “My job is just to uphold the law whether I agree or not. I don't agree with it, but I've got to uphold it. [¶] So, I cannot find . . . that [defendant] does not fall outside the spirit of the three strikes law. By his character and prospects, and that his many, many felony convictions occurring before and prior to the three strikes, so it puts him well within the three strikes law that was designed to gather up. And I can't find a way to get him out of it. [¶] So, therefore . . . I can't strike either strike. There's no way I can do it. So I decline to strike the strike because I don't think legally, on this particular fact, with [defendant's] character and prospects, I don't think I can. He's stuck with the strikes.”

On appeal, defendant contends the trial court erred in denying his *Romero* motion, because (1) it mistakenly believed it had no discretion, (2) it mistakenly relied upon an unpublished case from this court, and (3) the facts support striking one of defendant's priors. We disagree.

In *Romero*, the Supreme Court held that a trial court has discretion to dismiss three strikes prior felony conviction allegations under section 1385. (*Romero, supra*, 13 Cal.4th at pp. 529-530.) 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* (2004) 33 Cal.4th 367, 377 (*Carmony*)).

"[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." (*Carmony, supra*, 33 Cal.4th at p. 375.) "[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.) However, a trial court abuses its discretion in striking a prior conviction if it is "'guided solely by a personal antipathy for the effect that the three strikes law would have on [a] defendant,' while ignoring 'defendant's background,' 'the nature of his present offenses,' and other 'individualized considerations.' [Citation.]" (*Romero, supra*, 13 Cal.4th at p. 531.)

While it is true that "an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss" a strike prior (*Carmony, supra*, 33 Cal.4th at p. 378), we do not believe the court's remarks indicate that it misunderstood the scope of its authority. Examining the remarks in context, it reveals the trial court believed there could be no real doubt that defendant's behavior fell within the spirit of the three strikes law, after examining the relevant circumstances as pointed out by the parties. The court stated: "I cannot find . . . that [defendant] does not fall outside the spirit of the three strikes law. By his character and prospects, and that his many, many felony convictions occurring before and prior to the three strikes, so it puts him well within the three strikes

law that was designed to gather up. And I can't find a way to get him out of it. [¶] So, therefore . . . I can't strike either strike. There's no way I can do it. So I decline to strike the strike because I don't think legally, on this particular fact, with [defendant's] character and prospects, I don't think I can. He's stuck with the strikes." This statement does not suggest the trial court lacked all authority to dismiss defendant's prior strike convictions; rather, the court was simply acknowledging it could not dismiss defendant's strike priors under the law or based on its personal sympathy for defendant or dislike of the three strikes law.

Defendant makes much over the court's reference to a case where this court reversed the trial court's decision to strike a prior on the grounds of abuse of discretion. However, considered in light of the entirety of the court's statements, we conclude the trial court's reference to a prior case illustrates simply that it properly understood a "court's discretion to strike prior felony conviction allegations in furtherance of justice is limited." (*Romero, supra*, 13 Cal.4th at p. 530.) "[A] primary purpose of the [t]hree [s]trikes law was to restrict judicial discretion" (*People v. Garcia* (1999) 20 Cal.4th 490, 501), and "the three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so." (*Carmony, supra*, 33 Cal.4th at p. 378.) The record is clear that the trial court, in making its statements, was articulating the requirements of the law and its dissatisfaction with the sentencing strictures laid out by the three strikes law, not conveying any lack of awareness of its discretion to dismiss

prior strikes. We therefore reject defendant’s contention that the trial court misunderstood the scope of its discretion to dismiss his prior strike.

As pointed out above, defendant cannot show that the refusal to strike one of his prior convictions was arbitrary or irrational. Defendant has proven by his own actions that he is a repeat offender who has been to prison several times, committed parole violations, and continued to offend. Prior to his first strike offense burglary in 2000, defendant had been to prison twice. Later, while out on bail in a receiving stolen property case, defendant assaulted a peace officer, and after being released from prison for his assault offense, he committed the current burglary. Clearly, defendant was well within the spirit of the three strikes law. Accordingly, defendant has failed to rebut the “‘strong presumption’ [citation] that the trial judge properly exercised his discretion” (*In re Large* (2007) 41 Cal.4th 538, 551.)

IV. DISPOSITION

The judgment is affirmed.

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HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

KING

J.