

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

WALTER RAY GILDON,

Defendant and Appellant.

E061851

(Super.Ct.No. RIF1402139)

OPINION

APPEAL from the Superior Court of Riverside County. Michael B. Donner,
Judge. Affirmed.

Doris M. LeRoy, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Christopher P.
Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Walter Ray Gildon appeals his conviction on one count of assault with a deadly weapon. The only issue he raises on appeal is that the trial court abused its discretion in denying his request, pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, that the court strike one or both of his strike prior convictions. We find no abuse of discretion, and we will affirm the judgment.

PROCEDURAL HISTORY

Defendant was charged with one count of assault with a deadly weapon, a baseball bat, in violation of Penal Code section 245, subdivision (a)(1). (All further statutory citations refer to the Penal Code.) The information also alleged that defendant had served two prior felony prison terms within the meaning of section 667.5, subdivision (b), and that he had suffered two prior serious felony convictions within the meaning of section 667, subdivision (a). The same two prior convictions were alleged to be serious or violent convictions within the meaning of the three strikes law. (§§ 667, subds. (c), (e)(2)(A), 1170.12, subd. (c)(2)(A).)

A jury found defendant guilty of the charged offense. In a separate proceeding, defendant admitted the prior prison term and prior felony allegations. The trial court denied defendant's request to strike one or both strike priors. The court imposed a term of 11 years for the section 667, subdivision (a) and section 667.5, subdivision (b) enhancements and a consecutive term of 25 years to life for the current conviction.

Defendant filed a timely notice of appeal.

FACTS

On March 20, 2014, Riverside County Sheriff's Deputy Smith, who was off duty, saw defendant and Brenda Gille. Defendant had a baseball bat and a hammer in his hands. Defendant swung the bat at Gille two to four times. Smith did not see the bat strike Gille. He saw defendant put the bat and the hammer into a cart and walk away. Smith called 911.

Gille told Riverside Police Officer Thomas that defendant confronted her about a beanie she was wearing. He said it was his, that it had been stolen and that he wanted it back. Gille told him she had gotten the beanie from another transient. She gave it to defendant or defendant took it from her. Defendant went to his cart and retrieved the bat and hammer. He returned to Gille and demanded the return of the rest of the property he said had been stolen from him. She replied that she only had the beanie and repeated that she had received it from another transient. Defendant became angry and swung the bat at Gille two to three times, striking her once or twice on her calf. He then returned to his shopping cart and walked away.¹

Thomas saw a red stain on Gille's pant leg. He asked her to show him her leg. He observed a large bruise and small cut on her leg. The wounds appeared fresh. Gille confirmed that photographs of her leg showed a wound from the bat.

Defendant was later arrested nearby. Gille identified him as her assailant.

¹ At trial, Gille testified that defendant did not speak to her when he approached but immediately started swinging the bat. She testified that he might have said words to the effect that he did not like her or for her to get out of the way. She said he swung the bat six or seven times, striking her in her knee area, below her knees and below her waist.

LEGAL ANALYSIS

THE COURT PROPERLY DENIED DEFENDANT’S *ROMERO* REQUEST

“[A] trial court may strike or vacate an allegation or finding under the Three Strikes law that a defendant has previously been convicted of a serious and/or violent felony, on its own motion ‘in furtherance of justice’ pursuant to . . . section 1385(a).” (*People v. Williams* (1998) 17 Cal.4th 148, 158.) “[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law . . . 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.” (*Id.* at p. 161.) “[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.) A trial court abuses its discretion when the factual findings critical to its decision are not supported by substantial evidence. (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998.)

Defendant contends that the trial court abused its discretion because two points the court emphasized in announcing its decision not to strike defendant’s strike prior allegations are not supported by substantial evidence. First, the court characterized the assault on Gille as a violent offense, in that defendant struck the much smaller Gille with a baseball bat. Defendant contends that this was improper because the jury made no

finding that defendant actually struck Gille and because there is no credible evidence that he did strike Gille.

The jury was not required to find that defendant actually struck Gille in order to convict him of assault. (§ 240 [assault is an unlawful attempt, coupled with present ability, to commit a violent injury on the person of another].) The trial court, however, may rely on its own “factual findings regarding the real conduct underlying a defendant’s conviction in exercising its statutorily authorized discretion in choosing an appropriate sentence” “within the maximum term statutorily authorized by the jury’s verdict.” (*In re Coley* (2012) 55 Cal.4th 524, 558.) Here, the trial court’s finding that defendant did actually strike Gille is supported by Gille’s statement to Officer Thomas that defendant hit her once or twice and her testimony that defendant hit her more than once. The testimony of any witness is sufficient to support a conviction or a factual finding, unless the testimony is physically impossible or inherently improbable. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Neither the inconsistencies defendant points out in Gille’s testimony and her statement to Officer Thomas as to what color shirt defendant was wearing, how many times he swung the bat at her and how many times he hit her, nor Deputy Smith’s testimony that he did not see the bat make contact with Gille makes her statements that defendant did strike her either physically impossible nor inherently improbable. Moreover, her statements that defendant struck her were supported by the evidence that she had a fresh-looking bruise and cut on her leg. Accordingly, Gille’s and Thomas’s testimony constitute substantial evidence the trial court could properly rely upon to determine that the offense was a violent one.

Defendant also criticizes the trial court's conclusion that defendant was untrustworthy, based on the number of aliases revealed in the probation report. He notes that most of the "aliases" were merely variations on his true name and might have been the result of clerical errors rather than his deliberately giving misinformation to hide his identity. However, the court made its comment about defendant's multiple aliases in the context of describing defendant's lengthy criminal history, including multiple parole violations. The point the court was making was that defendant's unwillingness or inability either to follow the law or keep his promises not to violate any laws means that he "simply can't be out in public with other people and be counted on to be a law-abiding citizen. . . . [Y]our criminal history shows that you can't be trusted around other people. You can't be in the presence of other people without committing crime."

A defendant's criminal history is, of course, a primary consideration in determining whether the defendant can be deemed "outside the . . . spirit" of the three strikes law. (*People v. Williams, supra*, 17 Cal.4th at p. 161.) Here, defendant has a record of repeated offenses, incarcerations, parole and probation violations beginning in 1989 and continuing through the current offense. The only significant gaps between crimes occurred while defendant was incarcerated. Accordingly, the trial court did not abuse its discretion by declining to strike one or both of defendant's strike priors based on its conclusion that defendant posed a risk to the public.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.