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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.

SAMUEL BAINES,

Defendant and Appellant.

E062415

(Super.Ct.No. FVI1301562)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed with directions.

Jennifer Peabody, 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, and Melissa Mandel, Donald W. Ostertag, and Laura Baggett, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

On May 24, 2013, defendant and appellant, Samuel Baines, and codefendant Anthony Johnson¹ entered a T-Mobile store in Victorville, California. Using a pellet gun, defendant and Johnson directed three employees to the back of the store where the store's safe and inventory were, had them assist in the commission of the robbery, then bound each employee's hands and ankles. Defendant and Johnson took money from the store's safe and cash registers, and took high-end phones from the store's inventory, along with the three employees' personal cell phones.

A jury convicted defendant of three counts of kidnapping to commit robbery (Pen. Code, § 209, subd. (b)(1), counts 1-3),² three counts of robbery (§ 211, counts 4-6) and one count of burglary (§ 459, count 7). The trial court found that defendant had two prior strike convictions, and denied defendant's *Romero*³ motion to dismiss either or both of his prior strikes. The trial court sentenced defendant to 150 years to life in state prison.⁴

¹ Defendant and Johnson were tried separately.

² All further statutory references are to the Penal Code unless otherwise indicated.

³ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

⁴ Defendant was sentenced to an indeterminate term of 25 years to life on count 1 and consecutive terms of 25 years to life for each of his convictions in counts 2 through 6. The court also sentenced defendant to six years on the count 7 burglary conviction, but stayed the sentence. (§ 654.)

On this appeal, defendant contends the kidnapping to commit robbery convictions (counts 1-3) must be reversed because the movement of the three employees was merely incidental to the commission of the robberies, and did not increase their risk of harm over and above that attendant to the robberies. Next, he argues that, if the kidnapping to commit robbery convictions are affirmed, the robbery sentences (counts 4-6) must be stayed pursuant to section 654. Lastly, he asserts that the trial court abused its discretion in denying his *Romero* motion to strike either or both of his prior strike convictions, and that his aggregate sentence violates the Eighth and Fourteenth Amendments' prohibitions against cruel and unusual punishment. We agree defendant's robbery sentences in counts 4, 5, and 6 must be stayed pursuant to section 654, but we otherwise affirm the judgment.

II. STATEMENT OF FACTS

On May 24, 2013, Monica Gutierrez, Shyquaeta Lyle, and Gabriela Vargas were working at a T-Mobile store in Victorville, California. As Gutierrez was assisting a customer, she noticed two men, both wearing hats and sunglasses, and one carrying a duffle bag, walking back and forth in front of the store. After all the customers had left, the two men, later identified as defendant and Johnson, entered the store.

Defendant approached the counter where Gutierrez and Lyle were standing. He put his index finger to his mouth, signaling the women to be quiet, and pulled up his shirt to reveal a gun in the waistband of his pants. He then went into the back room, where Vargas was doing paperwork, and brought Vargas to the front counter. He ordered all three employees to lay face down on the ground behind the counter.

Johnson then instructed Lyle to lock up the store, which required Lyle, with Johnson's assistance, to pull the security gates down over the front doors and windows of the store. After the gates were pulled down, Lyle was taken back behind the counter and ordered to get back down on the floor.

The three employees were then taken to the back room of the store, where the store's safe and inventory cages were located. Throughout the robbery, the two men repeatedly instructed the three employees not to look at them. In the back room, defendant and Johnson ordered Lyle to lay on the floor, then bound Lyle's hands and ankles with duct tape. While brandishing the gun, defendant instructed Gutierrez and Vargas to place the higher-end phones, which were locked in inventory cages, into the duffle bag. Defendant held the gun at the back of Vargas's neck, and at times touched her neck with the gun, as he ordered her to fill the bag with merchandise. At the same time, Johnson went to the front of the store to take money from the registers. After the phones were placed in the duffle bag, defendant ordered Gutierrez to lay down on the floor, then taped Gutierrez's hands and ankles with duct tape.

The men then forced Vargas to give them the money from the safe in the back of the store. Vargas initially feigned ignorance about the money, but defendant threatened that "he was going to hurt her if she didn't get him the money" and that "she was going to leave in a body bag." Vargas relented, opened the safe, and placed the money inside the duffle bag. The men ordered Vargas to lay down on the floor, and they then bound her hands and ankles with duct tape.

Defendant and Johnson took approximately \$25,000 to \$26,000 in phones and approximately \$3,000 to \$4,000 in cash from the store. Defendant and Johnson then exited out the back door of the store, instructing the three employees not to look up.

Shortly after defendant and Johnson left the store, the three employees shut the back door, which defendant and Johnson had left slightly ajar, then untied each other. The employees went to the front of the store to call 911 and discovered that their personal cell phones were all missing. After the police arrived, the employees gave them an inventory of the items taken, as well as a copy of the store video surveillance footage. The video surveillance footage was played for the jury.

Gutierrez resigned from T-Mobile that very day and subsequently had to obtain counseling because she had difficulty being around people. She testified that her wrists were bruised from being bound so tightly.

One of the employees had the “Find My iPhone” application on her phone that had been stolen during the robbery. The police used this application to track the phone’s location to a set of apartments in Los Angeles. The police went through the trash cans outside one of the apartments and found a lanyard with a set of keys and a key fob attached to it. Police later confirmed the key fob opened the inventory cages of the T-Mobile store. Later that evening, on May 24, 2013, the police entered the apartment that they suspected was connected to the robbery. Inside the living room of the apartment, the police found mail addressed to defendant, and a black Nike duffle bag that contained two rolls of duct tape, several purple Nitrile latex-style gloves, and a black “sporting-type

glove.” The police also found a brand new Samsung smartphone, a plaid shirt that, based on the video surveillance footage, resembled what one of the perpetrators appeared to have worn during the robbery, as well as a “police scanner-style radio.” A purple Nitrile-style glove was found inside the front left pocket of the plaid shirt.

Six days later, on May 30, 2013, the police tracked defendant’s phone to a motel just outside the city limits of Hawthorne, California. The police saw defendant get into a car, and they followed him. When defendant began to drive erratically, the police officers performed a traffic stop and arrested defendant without incident. The officers recovered a black baseball hat and a silver-colored pellet gun, which they initially thought was an actual firearm, from the trunk of defendant’s car. Both the baseball hat and the pellet gun were similar to those depicted in the video footage from the robbery.

During a police interview, which was conducted the day of his arrest, defendant admitted to participating in the robbery. He admitted using the gloves, duct tape, and the pellet gun in the robbery and admitted owning the plaid shirt and duct tape that were found in the apartment that police searched, but claimed the black duffel bag belonged to Johnson. Defendant claimed he was months behind on rent and was in danger of being evicted from his apartment, and he committed the crime to “get over the hump.” He emphasized that he chose a T-Mobile store in Victorville because “it’s quiet” and had less of a police presence than in other cities. He also explained that he wanted to commit a low-risk crime, and that he used a fake gun to ensure that nobody would be hurt. Lastly, he told the police interrogators that he duct taped the three employees because he “feared

they would run out,” and because he wanted to “scare” them and to “[h]ave ‘em cooperate.”

III. DISCUSSION

A. *Substantial Evidence Supports Defendant’s Convictions of Kidnapping for Robbery (Counts 1-3)*

Defendant was convicted in counts 1, 2, and 3 of kidnapping for purposes of robbery (§ 209, subd. (b)) based on his movements of Lyle, Vargas, and Gutierrez, the three employees, inside the T-Mobile store. Defendant claims that insufficient evidence supports these convictions. He claims the evidence showed only that the three employees were moved to various places inside the store solely to facilitate the robberies, and their movements did not increase the risk of harm to them over and above the risk present in the underlying robberies. We disagree.

“*On appeal*, an appellate court deciding whether sufficient evidence supports a verdict must determine whether the record contains substantial evidence—which we repeatedly have described as evidence that is reasonable, credible, and of solid value—from which a reasonable jury could find the accused guilty beyond a reasonable doubt. [Citation.] ‘In evaluating the sufficiency of evidence, “the relevant question on appeal is not whether *we* are convinced beyond a reasonable doubt” [citation], but “whether “*any* rational trier of fact” could have been so persuaded.” . . .’ [Citation.]” (*People v. Hovarter* (2008) 44 Cal.4th 983, 996-997.) We presume in support of the judgment “the

existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

Kidnapping for robbery requires movement of the victim that “is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense.” (§ 209, subd. (b)(2).) As to the “beyond that merely incidental” prong, the jury considers the scope and nature of the movement, which includes the actual distance a victim is moved, as well as the context of the environment in which the movement occurred. (*People v. Martinez* (1999) 20 Cal.4th 225, 233; *People v. Leavel* (2012) 203 Cal.App.4th 823, 833.)

Whether the movement of the victims was merely incidental to the robbery must be made in the context of the totality of the circumstances attending the robbery (*People v. James* (2007) 148 Cal.App.4th 446, 454 (*James*)), as there is no minimum distance a defendant must move a victim to satisfy this prong (*People v. Vines* (2011) 51 Cal.4th 830, 870). A “movement that is *not* necessary to a robbery is also *not* merely incidental to it. . . . Lack of necessity is a sufficient basis to conclude a movement is not merely incidental” (*James, supra*, at p. 455, fns. omitted.)

Regarding the second prong, “the risk of harm ‘arises from the perpetrator’s use of force or fear, and from brief movements incidental to the robbery.’ [Citation.]” (*James, supra*, 148 Cal.App.4th at p. 455.) Factors that “increase[] the risk of harm to the victim over and above that necessarily present in” the robbery include a decreased likelihood of detection, danger inherent in a victim’s foreseeable attempts to escape, and the attacker’s

enhanced opportunity to commit additional crimes. (*People v. Martinez, supra*, 20 Cal.4th at p. 232; *People v. Simmons* (2015) 233 Cal.App.4th 1458, 1471.) The increased risk of harm may include psychological harm. (*People v. Nguyen* (2000) 22 Cal.4th 872, 886; *People v. Robertson* (2012) 208 Cal.App.4th 965, 984.)

Vines is instructive regarding the asportation requirement for kidnapping for robbery. In *Vines*, the defendant forced a McDonald's manager at gunpoint to open the restaurant's safe. After taking the cash from the safe, the defendant walked the manager to the back of the restaurant and ordered the manager, along with three other employees, to head downstairs into the basement. The defendant locked the employees in the freezer while he completed the robbery and escaped. (*People v. Vines, supra*, 51 Cal.4th at p. 870.) The court concluded that sufficient evidence of asportation supported the defendant's conviction on four counts of kidnapping to commit robbery, as the "scope and nature" of moving the manager, along with the three other victims, from the front of the store, down a stairway and into the freezer, was not "merely incidental" to the commission of the robbery. (*Id.* at p. 871.) The court explained that "the movement subjected the victims to a substantially increased risk of harm because of . . . the decreased likelihood of detection, and the danger inherent in the victims' foreseeable attempts to escape such an environment." (*Ibid.*)

Because there is no minimum distance required to satisfy the “beyond that merely incidental” prong of kidnapping for robbery (§ 209, subd. (b)(2)), courts have upheld kidnapping for robbery convictions where the movement of the victims did not span a great distance. (*People v. Simmons, supra*, 233 Cal.App.4th at p. 1472 [movement from exterior to interior of home “not only increased the risk of harm to the victims, but it also caused additional harm *in fact*” in the form of psychological trauma to one of the victims]; *People v. Leavel, supra*, 203 Cal.App.4th at pp. 835-836 [movement from kitchen to bedroom of same home not “merely incidental” to commission of the robbery, because it decreased the possibility of detection, escape or rescue, and enhanced the opportunity to commit additional crimes against the victim]; *People v. Cass* (1960) 178 Cal.App.2d 305, 307 [forcible removal of store clerk from one part of the store to another to obtain money from a cash box supported kidnapping for robbery conviction].) Courts have also reversed kidnapping for robbery convictions where the victims were moved short distances. (*People v. Morrison* (1971) 4 Cal.3d 442, 443 [movement of victim up and down stairs and into various rooms within a private residence was “merely incidental to the robbery and did not substantially increase the risk of harm beyond that inherent in the robbery itself.”]; *People v. Daniels* (1969) 71 Cal.2d 1119, 1140 [movement of victims inside the premises was incidental to the crime]; *People v. John* (1983) 149 Cal.App.3d 798, 803, 806-807 [movement of victim approximately 465 feet within the same location, where “none of it was physically violent” was merely incidental to the

robbery and did not substantially increase the risk of harm beyond that inherent in the robbery].)

Here, defendant and Johnson moved the three employees throughout the store. They forced Lyle to lock and secure the front door of the store before moving her to the back of the store, where the store's safe and inventory were located. They forced Gutierrez to the back of the store and, while defendant brandished a gun, had her transfer the store's high-end phones from the inventory cages to defendant and Johnson's duffel bag. They moved Vargas to and from the back of the store, where, at gunpoint, she was forced to provide defendant and Johnson with access to the store's safe, along with its inventory of high-end phones.

It was not necessary for defendant to move the three employees around the T-Mobile store in order to commit the robbery, as defendant and Johnson could have obtained the key fob and the combination to the safe from the three employees, restrained them, then taken the store's cash and inventory. Because the movement of the three employees was not necessary to the commission of the robbery, the movement was not "merely incidental" to the robbery. (*James, supra*, 148 Cal.App.4th at p. 455.)

Furthermore, defendant "increase[d] the risk of harm to [the three employees] over and above that necessarily present in[] the intended underlying offense" (§ 209, subd. (b)(2)) when he forced Lyle to lock and secure the store by pulling down the security gates over the front doors and windows, and when he and Johnson took the three employees' personal cell phones. These actions "decreased [the] likelihood of

detection” and it “enhanced [defendant’s] opportunity to commit additional crimes” (*People v. Martinez, supra*, 20 Cal.4th at p. 232; *People v. Simmons, supra*, 233 Cal.App.4th at p. 1471), as the three employees were prevented from communicating electronically with anyone outside the store who may have been able to offer assistance or report the ongoing crimes to the authorities. Furthermore, by lowering the security gates and moving the three employees to the back of the store, people outside the store may not have been aware of the ongoing robberies, and, even if they were, would have been unable to enter the store to provide assistance. In addition, the movement of the three employees also increased the risk of harm to the victims, as the employees could have attempted to resist, fight back, or flee, which could have resulted in further violence, including the possibility that defendant would fire his pellet gun at any or all of the employees. Indeed, defendant pointed his gun at Vargas, at times touching it to her neck, and threatened to have her leave “in a body bag” if she failed to cooperate with him. The movement of the employees “not only increased the *risk* of harm to the [employees], but it also caused additional harm *in fact*” in the form of physical and psychological trauma to Gutierrez. (*People v. Simmons, supra*, 233 Cal.App.4th at p. 1472.)

Defendant relies primarily on this court’s two-to-one decision in *People v. Hoard* (2002) 103 Cal.App.4th 599 in contending that the movement of the three employees here was merely incidental to the robbery, and did not increase their risk of harm. In *Hoard*, the defendant robbed a jewelry store by forcing the two employees about 50 feet to an office at the back of the store. There, the defendant restrained the employees’

ankles and wrists with duct tape, and he duct taped their mouths, before he began taking jewelry from the store's display cases. When customers entered the store, he told them that it was closed for maintenance or performing inventory. The court majority concluded that the defendant's movement of the victims "was 'merely incidental' to the robbery" and that "the movement did not substantially increase the risk of harm" to the victims. (*Id.* at pp. 602, 607.)

Hoard is readily distinguishable from the present facts. In *Hoard*, the defendants did nothing more than briefly move and immobilize the jewelry store employees before completing the robbery. Here, defendant forced the employees to assist in the robbery by having Lyle lock and secure the premises, forcing Gutierrez and Vargas to the back of the store to load the phones into defendant's duffle bag, and then compelling Vargas to provide defendant and Johnson with access to the store's cash. Only after defendant had received assistance from each employee did he restrain them with duct tape. As noted, it was not necessary for defendant to move the three employees around the store in order to commit the robbery. The concurrence and dissent in *Hoard* recognized that a number of cases had equated "incidental" with "necessary," and it was critical that the *Hoard* majority "offer[ed] no sound reason why the equating of 'incidental' and 'necessary' is insupportable." (*People v. Hoard, supra*, 103 Cal.App.4th at p. 612 (conc. & dis. opn. of Ramirez, P.J.)) Indeed, at least one case since *Hoard* has agreed that, where the movement of the victims was not necessary for the commission of the robbery, the movement was not incidental to it. (*James, supra*, 148 Cal.App.4th at p. 455.)

Furthermore, the *Hoard* concurrence and dissent correctly explained that, “regardless of whether ‘incidental’ and ‘necessary’ may properly be equated, the question to be answered . . . is whether there was a sufficient basis upon which this jury could reasonably conclude that the movements of the victims were not incidental to the robberies,” and that the “movement increased the risk of harm to the victims over and above that necessarily present” in the robberies. (*People v. Hoard, supra*, 103 Cal.App.4th at p. 614 (conc. & dis. opn. of Ramirez, P.J).) Based on the record, there is a sufficient basis upon which the jury could reasonably conclude that the movements of the three employees were not merely incidental to the robberies.

There is also a sufficient basis upon which the jury could have reasonably concluded that the movements of these employees increased their risk of harm beyond the risk attendant to the robberies. As noted, defendant warned Vargas that she would “leave in a body bag” if she failed to cooperate, and Gutierrez sustained both physical and psychological injuries as a result of the incident. Furthermore, it was foreseeable that the employees could have resisted or attempted to escape, which also increased their risk of harm over and above that necessarily present in the robberies. Based on the whole record, substantial evidence supports defendant’s convictions of kidnapping for robbery.

B. Defendant’s Robbery Sentences (Counts 4-6) Must Be Stayed

At sentencing, the trial court determined that it would not stay the robbery sentences pursuant to section 654, explaining: “You can rob somebody. It’s not so much that you can kidnap them without robbing them and still have a kidnapping for the

purpose of robbery. What I'm thinking of is they also robbed and kidnapped. [¶] So not only did they commit a robbery, but they actually took someone into a place where their safety was at much greater risk. Taking someone into a back room and duct-taping them, moving them around the store, those are all separate things that seemed to me should be treated and there should be responsibility for. [¶] And it's different than just a straight, give me the money, and out the door. So I'm not sure whether or not I have discretion. But I put that analysis on the record so that I could try and explain why, based on the fact that there are separate crimes that were committed of a different type than just a robbery with an increased danger to the victims in this case, . . . , where I . . . come to an analysis that says I could grant the relief under [section] 654. I think it's inappropriate for me to do so, and would decline to do it in any event."

Defendant argues that, pursuant to section 654, he cannot be sentenced for both his kidnapping to commit robbery (counts 1-3) and robbery (counts 4-6) convictions. We agree that defendant's robbery sentences must be stayed.

A defendant may not be punished both for robbery and for kidnapping for the purpose of robbery, where both crimes were committed pursuant to a single intent and objective of robbing the victims. (*People v. Lewis* (2008) 43 Cal.4th 415, 519, overruled on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 919-921; *People v. Beamon* (1973) 8 Cal.3d 625, 639-640.) Section 654 limits "punishment for multiple convictions arising out of either an act or omission or a course of conduct deemed to be indivisible in

time, . . . wherein the accused entertained a principal objective to which other objectives, if any, were merely incidental.” (*People v. Beamon, supra*, at p. 639, fn. omitted.)

“Whether the facts and circumstances reveal a single intent and objective within the meaning of Penal Code section 654 is generally a factual matter; the dimension and meaning of section 654 is a legal question.” [Citation.] We apply the substantial evidence standard of review to the trial court’s implied finding that a defendant harbored a separate intent and objective for each offense. [Citations.]” (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1414.) We view the evidence in the light most favorable to the judgment, drawing all reasonable deductions in favor of the judgment. (*People v. Boyer* (2006) 38 Cal.4th 412, 480.) If the verdict is supported by substantial evidence, we are bound to give due deference to the trier of fact and to not retry the case. (*People v. Snow* (2003) 30 Cal.4th 43, 66.) We do not reweigh the evidence; rather, we evaluate whether the evidence presented at trial and the reasonable inferences that could be derived from the evidence support the jury’s conclusions. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Here, in committing the kidnappings for robbery and the robberies of the three employees, the evidence showed defendant’s “principal objective” was to commit the robbery of the three employees. (*People v. Beamon, supra*, 8 Cal.3d at p. 639.) During the police interview, defendant told the police that he restrained the three employees with duct tape because he “didn’t wanna take a chance of” the employees escaping, and because he wanted “to scare” them, and to “[h]ave ‘em cooperate.” However, his

objective of scaring the employees into cooperating with defendant and Johnson was “merely incidental” to, and not independent of, the robberies themselves. (*Ibid.*)

Accordingly, pursuant to section 654, the sentences for the robbery convictions in counts 4, 5, and 6 must be stayed.

C. The Trial Court Did Not Abuse Its Discretion in Declining to Dismiss Either of Defendant’s Prior Strikes

1. Background—Denial of Defendant’s *Romero* Motion

After the trial court found defendant’s two prior strike enhancement allegations true, defendant moved to dismiss one or both of his prior strikes for purposes of sentencing under *Romero*. Defendant wrote a letter, which his defense counsel read to the court.

In the letter, defendant emphasized that he suffered his first strike in 1989 for second degree robbery (§ 211), and his second strike in 1994 for attempted second degree robbery (§§ 211, 664). Defendant was released on parole in 1997 after serving three years in “fire camp.” He “did not have any write-ups in prison, fire camp, or parole,” “was not in and out of jail being a menace to society or doing drugs,” and was employed from 1998 through 2013. He committed no further crimes until he committed the present crimes in May 2013. Defendant represented that he only committed the present crimes because he was three months behind on rent, had run out of unemployment benefits, and, “in his mind, he saw no other option but to resort to a crime that he felt he could complete

with no one getting hurt.” Defendant used the pellet gun because he felt he could commit the crime “with no one getting hurt” and “that would be low risk to everyone involved.”

Defendant also pointed out that he was 51 years old, and had recently found religion. He implored the court to reduce the fines and fees, strike the priors, and sentence him to seven years to life on each of the kidnapping to commit robbery convictions (counts 1-3) with the sentences on the robbery convictions (counts 4-6) running concurrent to the sentences imposed on counts 1 through 3.

The trial court acknowledged it had read defendant’s letter, along with the probation report, and was “not close to striking a strike.” The court was troubled with defendant’s assertion that he felt he had no other option but to commit the felony, and it was not convinced by defendant’s argument that he “didn’t want to hurt anybody, didn’t want to scare anyone,” particularly when defendant threatened to place one of the employees in a body bag. Although defendant did not use a real gun in the commission of the offenses, the trial court explained that “a gun that shoots BBs can certainly hurt people.” The court explained it was not convinced that defendant should be treated more leniently, as it could not “even get close to countenancing why under these circumstances he’s justified in committing these serious and dangerous crimes.”

2. Analysis

Defendant claims the trial court abused its discretion in declining to exercise its discretion, under section 1385 and *Romero*, to dismiss either or both of defendant’s two prior strikes “in furtherance of justice” for purposes of sentencing.

As both parties agree, 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.) “[A] court’s decision to strike a qualifying prior conviction is discretionary. [Citation.] As such, a court’s decision *not* to strike a prior necessarily requires some exercise of discretion.” (*Id.* at p. 375.) We conclude the trial court did not abuse its discretion in declining to strike either, or both, of defendant’s prior strike convictions.

In deciding whether to exercise its discretion to dismiss a prior strike conviction, the trial 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 [spirit of the “Three Strikes” law], 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; *People v. Leavel*, *supra*, 203 Cal.App.4th at pp. 836-837.) There is a legislative presumption that a court acts properly whenever it sentences a defendant in accordance with the Three Strikes law, and a court is not required to state its reasons for declining to exercise its discretion under section 1385. (*People v. Carmony*, *supra*, 33 Cal.4th at p. 376; *People v. Gillispie* (1997) 60 Cal.App.4th 429, 433.)

Defendant claims the trial court abused its discretion in denying his *Romero* motion because it considered only the nature and circumstances of his current offenses

without considering the age of his two prior strikes, his minimal criminal history since his release from prison in 1997, or “the sentence [he] would have received absent the Three Strikes enhancement.” Defendant is incorrect. The trial court denied defendant’s *Romero* motion after noting on the record that it had read and considered defendant’s submission, and the probation report, all of which addressed “the nature and circumstances of [the] present felonies and prior serious and/or violent felony convictions, and the particulars of [defendant’s] background, character, and prospects” (*People v. Williams, supra*, 17 Cal.4th at p. 161.)

Both defendant’s past strikes and his current offenses involved the use of violence. According to the probation report, defendant was 25 years of age when he suffered his first strike in 1989 for second degree robbery. (Pen. Code, § 211.) He was released on parole in 1991, after serving two years of his sentence, but suffered his second strike for attempted second degree robbery (Pen. Code, §§ 211, 664) approximately three years later in 1994, when he was 31 years old. Furthermore, in addition to his two prior strikes, defendant was convicted of five separate felonies between 1981 and 1986, including two burglary convictions (Pen. Code, § 459), one conviction each for receiving stolen property (Pen. Code, § 496), unlawful driving or taking a motor vehicle (Veh. Code, § 10851, subd. (a)), and being a felon in possession of a firearm (Pen. Code, § 12021).

Although defendant “suffered no further felony convictions . . . other than minor traffic offenses”⁵ between his 1994 strike and the current offense, at least one court has explained that “the number of [defendant’s] prior convictions operates as a factor in aggravation, as may the nature of his prior and present crimes and the timing with which they were committed.” (*People v. Bishop* (1997) 56 Cal.App.4th 1245, 1250-1251.) Thus, defendant’s five prior felony convictions, along with his two prior strikes, are factors that support the trial court’s determination not to strike either or both of defendant’s prior strikes.

In light of the nature and circumstances of both his present felonies and the prior violent felony convictions, the trial court reasonably determined that defendant fell within the spirit of the Three Strikes law, and it did not abuse its discretion when it declined to dismiss either or both of defendant’s prior strikes.

D. *Defendant’s Sentence is Not Cruel or Unusual*

Defendant contends his sentence constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution. We reject this contention.

A sentence violates the federal Constitution if it is “grossly disproportionate” to the severity of the crime. (U.S. Const., 8th & 14th Amends.; *People v. Carmony* (2005) 127 Cal.App.4th 1066, 1076.) Defendant argues that his sentence “offends the principles

⁵ In 1998 and 2006, defendant was convicted in Las Vegas, Nevada of misdemeanor negligent driving, and misdemeanor speeding, respectively.

set forth in the Eighth and Fourteenth Amendments of the United States Constitution,” particularly where he committed a “crime in which no one was injured.” As noted, Gutierrez suffered both physical and psychological harm due to defendant’s commission of the crimes. Furthermore, the United States Supreme Court has upheld statutory schemes, such as California’s Three Strikes law, that result in life imprisonment for recidivists upon a third conviction, even for nonviolent felonies, and in the face of challenges that such sentences violate the federal constitutional prohibition against cruel and unusual punishment. (See *Ewing v. California* (2003) 538 U.S. 11, 18, 30-31 [25-year-to-life sentence under the Three Strikes law for the theft of three golf clubs worth \$399 apiece]; *Lockyer v. Andrade* (2003) 538 U.S. 63 [two consecutive 25-year-to-life terms for two separate thefts of videotapes worth \$150].) As *Ewing* recognized, the protection afforded by the Eighth Amendment is narrow and applies only in the ““exceedingly rare”” and ““extreme”” case. (*Ewing v. California, supra*, 538 U.S. at p. 21.) Defendant has not demonstrated that this is the exceedingly rare and extreme case that violates the federal Constitution, and we reject his claim that his sentence of 25 years to life on each of counts 1 to 3, as a third strike offender, is “grossly disproportionate” to the kidnappings of Gutierrez, Lyle, and Vargas in the commission of the robberies of the three employees.

IV. DISPOSITION

Defendant’s sentence is modified to stay the 25-year-to-life terms on defendant’s robbery convictions in counts 4, 5, and 6. Pursuant to the modification, the trial court is

directed to prepare a supplemental sentencing minute order and an amended abstract of judgment to reflect that defendant's 25-year-to-life sentences on counts 4, 5, and 6 have been stayed pursuant to section 654. The trial court is also directed to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

CODRINGTON
J.

SLOUGH
J.