

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ERMILO RODRIGUEZ MORALES,

Defendant and Appellant.

F061607

(Super. Ct. No. BF131853A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Thea Greenhalgh, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Leanne Le Mon, and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

*Before Levy, Acting P.J., Dawson, J., and Detjen, J.

STATEMENT OF THE CASE

On May 21, 2010, appellant, Ermilo Rodriguez Morales, was charged in an information with forcible oral copulation (Pen. Code, § 288a, subd. (c)(2), count one),¹ oral copulation by a person over age 21 on a person under age 16 (§ 288a, subd. (b)(2), count two), and committing a lewd act on a child 14 or 15 years old while being at least 10 years older than the minor (§ 288, subd. (c)(1), count three). The information also alleged a prior serious felony conviction for assault with a deadly weapon (§ 245, subd. (a)(1)) within the meaning of the three strikes law (§§ 667, subs. (b)-(i) & 1170.12, subs. (a)-(d)) and as a prior serious felony conviction (§ 667, subd. (a)). The information alleged five prior prison term enhancements (§ 667.5, subd. (b)).

At the conclusion of a jury trial on September 16, 2010, appellant was found guilty of all three counts. Appellant waived his right to a jury trial on the special allegations. In a bifurcated proceeding, the court found the allegations true. Prior to the sentencing hearing, appellant filed a request that the trial court strike the prior serious felony conviction allegation pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). Appellant also filed a motion to dismiss the strike allegation based on insufficiency of the evidence that the prior conviction was a strike offense.

On December 17, 2010, the trial court denied appellant's motion to dismiss the strike allegation for insufficiency of the evidence and denied appellant's request to strike the allegation pursuant to *Romero*. The court sentenced appellant to the upper term of eight years on count one, doubled to 16 years pursuant to the three strikes law. The court imposed a consecutive term of five years for the prior serious felony enhancement and

¹ Unless otherwise indicated, all statutory references are to the Penal Code.

four consecutive terms of one year for the prior prison term enhancements.² Appellant's total prison term is a determinate sentence of 25 years.

Appellant contends the trial court abused its discretion in denying his *Romero* request and that his sentence constituted cruel and unusual punishment. We disagree and will affirm the judgment.

FACTS

Lewd and Lascivious Conduct

In January 2010, S.C. was 15 years old. S.C. lived close to appellant and they are related to each other. On January 24, 2010, S.C. had vaginal intercourse with a 16-year-old boy. He also orally copulated her. The next day, S.C. showered, put on new underwear, and went to a doctor appointment.

When S.C. went to make lunch, she discovered they were out of mayonnaise so she called appellant. Appellant invited S.C. to his home. While at appellant's home, S.C. went into the bedroom and talked to him about her ex-boyfriend. Appellant pulled down S.C.'s pants, took off her underwear, and made her lie down.

S.C. told appellant that what he was doing was not right. With S.C. on her back, appellant opened her legs. Appellant performed oral sex on S.C., licking her vagina. Appellant also used his hands to open S.C.'s vagina. S.C. again told appellant that what he was doing was not right and she asked him to stop. S.C. did nothing to provoke appellant's conduct. She was afraid of him because he had told her in the past about the many people he fought and the guns and knives he carried. S.C. did not physically resist appellant for this reason. After two or three minutes appellant stopped.

² The court found that one of the prior prison term enhancements applied to the same conviction as the prior serious felony enhancement and stayed appellant's sentence for that enhancement. The court stayed appellant's sentences on counts two and three pursuant to section 654.

S.C. went to a neighbor's house and cried for 15 to 20 minutes. S.C. then talked to the police. An audio recording of S.C.'s conversation with the dispatcher was played for the jury. S.C. told the dispatcher that she was 15 years old, went to appellant's home to borrow mayonnaise, appellant took off her pants, and licked her "down there." A Bakersfield police officer questioned S.C. while S.C. was being examined at the hospital. S.C. was upset and periodically cried.

Donna Beeson, a registered nurse, conducted a sexual assault examination of S.C. on the afternoon of January 25, 2010. Beeson described S.C. as being "pretty quiet, a little angry but definitely upset." S.C. told Beeson that she had vaginal and oral sex the previous day. S.C. explained that she was related to appellant, who put his head between her legs and licked her. S.C. was not certain if appellant had ejaculated. S.C. had not urinated, had a bowel movement, used body wipes, used a tampon, douched, or used water or soap between the time of the assault and the examination.

Later forensic testing of S.C.'s clothes showed that her underwear tested positive for semen and amylase, an enzyme found in high concentrations in saliva and lower concentrations from other bodily fluids. Labial swabs from S.C. tested positive for semen. DNA testing from one of the labial swabs were from an unknown male who was not appellant. Two semen samples taken from the victim's underwear tested positive for the unknown male and appellant could not be excluded. The probability of appellant's inclusion in the Caucasian population was one in 31 million; in the African-American population it was one in 41 million; and in the Hispanic population it was one in 16 million. Appellant's saliva or other epithelial cell was in the victim's underwear.

Appellant's DNA expert testified that the amount of sperm cells present in the victim's underwear was small. DNA could have been transferred from one item to another, such as from a bed sheet or a couch to the victim's underwear.

Romero Hearing

Appellant's criminal record began in 1987 with a series of misdemeanor drug and vehicle offenses. Between 1987 and 1990, appellant had at least three convictions for driving while intoxicated and five violations of the Health and Safety Code. Appellant had a battery conviction in 1988 against a custodial officer (§ 243, subdivision (c)) that was reduced to a misdemeanor at sentencing. In 1989, appellant had a conviction for burglary (§ 460.2) that was also reduced to a misdemeanor at sentencing. In 1990, appellant had a felony drug conviction (Health & Saf. Code, § 11377, subd. (a)) for which he was sentenced to prison. Appellant violated his parole in that case.

In 1992, appellant was convicted of felony assault with a deadly weapon for using his car to hit the victim's car. Appellant was sentenced to state prison, was released on parole, and violated his parole. In 1994, appellant was convicted of a new felony narcotics offense (Health & Saf. Code, § 11377, subd. (a)) and being a felon in possession of a firearm (§ 12020, subd. (a)). He was sentenced to state prison and again violated his parole.

Between 1995 and 1997, appellant had 11 violations of the Vehicle Code, including a conviction for driving under the influence. Appellant also had a misdemeanor Health and Safety Code conviction. Appellant had numerous violations of probation.

In 1998, appellant was convicted of felony assault of executive officers attempting to perform their duty. Appellant was paroled three times and violated his parole twice. In 2001, appellant was convicted of a new felony narcotics offense (Health & Saf. Code, § 11378). Appellant was paroled six times for this offense. He violated his parole five times. Appellant had two more misdemeanor convictions in 2007.

The trial court noted appellant's lengthy criminal history and violations of parole at the hearing on appellant's *Romero* request. The court failed to find evidence that

appellant had “in any way rehabilitated himself after being given many opportunities.” Weighing his criminal past with the seriousness of the current offense, the court refused to strike the prior serious felony conviction.

ROMERO DISCRETION

Appellant contends the trial court abused its discretion in failing to strike his prior serious felony conviction pursuant to section 1385 and *Romero, supra*, 13 Cal.4th 497.

We disagree.

We review a ruling upon a motion to strike a prior felony conviction under a deferential abuse of discretion standard. (*People v. Williams* (1998) 17 Cal.4th 148, 162.) The appellant bears the burden of establishing that the trial court’s decision was unreasonable or arbitrary. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978 [presumption that trial court acts to achieve lawful sentencing objectives].) We do not substitute our judgment for that of the trial court. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310 (*Myers*).) “It is not enough to show that reasonable people might disagree about whether to strike one or more of [the defendant’s] prior convictions.” (*Ibid.*) “[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).)

Defense counsel made a written request pursuant to *Romero* and also argued at the sentencing hearing for the application of *Romero*. The trial court was well aware of its discretion to strike the prior serious felony conviction pursuant to *Romero*, but declined to do so, noting appellant’s serious criminal history and his inability to reform himself despite opportunities to do so. Appellant had misdemeanor battery convictions, and a felony conviction for assault with a deadly weapon.

Appellant’s victim in the current case was his own relative. Despite her pleas for appellant to stop his sexual conduct on her, appellant continued with his crime.

Appellant was first convicted of a felony in 1992, but had been shown clemency by sentencing courts in 1988 and 1989 for offenses that could have been sentenced as felonies. Appellant had nearly a dozen violations of parole and numerous probation violations.

Appellant is essentially asking this court to reweigh the evidence and substitute our judgment for that of the trial court. We decline his invitation to do so. “Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court’s ruling, even if we might have ruled differently in the first instance.” (*Myers, supra*, 69 Cal.App.4th at p. 310, quoted with approval in *Carmony, supra*, 33 Cal.4th at p. 378.)

The record in this case shows that the court understood its discretionary authority and it weighed all of the competing facts to reach a reasonable conclusion. After evaluating the entirety of that information, the court drew its ultimate conclusion and declined to exercise its discretion to strike one or more of the prior serious felony convictions. In view of these facts and circumstances, appellant has failed to show abuse of discretion. (See *Carmony, supra*, 33 Cal.4th at pp. 378-380; *Myers, supra*, 69 Cal.App.4th at p. 310.)

CRUEL AND UNUSUAL PUNISHMENT

Appellant further argues that the evidence against him was less than overwhelming and it was cruel and unusual punishment for the trial court not to strike his prior serious felony conviction.³ We again find appellant’s argument unpersuasive.

³ Respondent initially contends that this argument is forfeited. At sentencing, however, defense counsel argued that there was an Eighth Amendment issue because the three strikes law was not adopted until two years after appellant was convicted of the strike offense. We find that although skeletal, this argument preserves the issue for appellate review. We therefore reject respondent’s forfeiture argument. In supplemental briefing, appellant contends that if forfeiture applies to this case, his trial counsel was

We initially note that the evidence adduced at trial was not weak or less than overwhelming as appellant asserts. We further find that appellant's current conviction was egregious. The victim was his own relative and was only 15 years old. She was afraid of appellant because she knew of his violent past. We reject appellant's assertion that his prior serious felony conviction was too remote in time. The trial court accurately noted that appellant had a lengthy criminal record after that conviction and violated probation and parole many times.⁴

Appellant further argues that although he suffered three convictions, all of the convictions were from a single incident. The trial court was well aware of this fact and stayed appellant's sentences in counts two and three based on section 654.

Appellant is arguing that his sentence is disproportionate to the seriousness of his offense. The trial court properly looked at the gravity of the present offense, but also to appellant's long history of recidivism and many violations of probation and parole.

It is defendant's recidivism, *in combination with* his current crime, that brings him within the three strikes law. (*People v. Ayon* (1996) 46 Cal.App.4th 385, 400 [disapproved on another ground in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10].) Because the Legislature may constitutionally enact statutes imposing more severe punishment for habitual criminals, it is illogical to compare defendant's punishment for his offense, which includes his recidivist behavior, to the punishment of others who have committed more serious crimes, but have not qualified as repeat felons. (*People v.*

ineffective. In light of our ruling on forfeiture, we do not reach appellant's alternative argument that trial counsel was ineffective.

⁴ We observe that appellant's sentence was a determinate sentence of 25 years. He did not receive a sentence of 25 years to life. Appellant's sentence on count one was eight years, doubled to 16 years pursuant to the three strikes law, and he received consecutive sentences for his multiple status enhancements.

Romero (2002) 99 Cal.App.4th 1418, 1433.) We find that appellant has failed to show that his sentence was cruel or unusual punishment.

DISPOSITION

The judgment is affirmed.