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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

KEITH LAMONT TRIBBLE,

Defendant and Appellant.

F062302

(Stanislaus Sup. Ct. No. 1407523A)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Ricardo Cordova, Judge.

Stephen M. Hinkle, 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, Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

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STATEMENT OF THE CASE

On March 9, 2010, the Stanislaus County District Attorney filed an information in superior court charging appellant Keith Lamont Tribble as follows: count 1 – assault

likely to produce great bodily injury (Pen. Code,¹ § 245, subd. (a)(1)); count 2 – sexual battery on a restrained person (§ 243.4, subd. (a)); count 3 – false imprisonment (§ 236); and count 4 – burglary (§ 459). The district attorney specially alleged appellant had sustained two strike priors (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and had served a prior prison term (§ 667.5, subd. (b)).

On October 8, 2009, proceedings were suspended for a mental evaluation of the appellant (§ 1368) and were reinstated on November 9, 2009.

On January 11, 2011, jury trial commenced.

On January 13, 2011, the jury returned verdicts finding appellant not guilty of count 4 and guilty as charged of counts 1 through 3. On January 14, 2011, the court found all of the special allegations to be true.

On March 14, 2011, appellant filed a motion inviting the court to dismiss one or both of the strike priors.

On March 29, 2011, the court conducted a sentencing hearing, denied appellant's motion to strike, and sentenced him to a total term of 51 years in state prison. The court imposed consecutive terms of 25 years to life on counts 1 and 2, a concurrent term of 25 years to life on count 3, and a consecutive one-year term for the prior prison term. The court awarded 870 days of presentence custody credits, imposed a \$5,000 restitution fine (§ 1202.4, subd. (b)), and imposed and suspended a second such fine (§ 1202.45).

On April 13, 2011, appellant filed a timely notice of appeal.

STATEMENT OF FACTS

On August 27, 2009, H.C. was working as a housekeeper at a motel in Modesto. The outer door to the room in which she was working was open while she cleaned the bedroom and bathroom. While bent over cleaning the bathtub, she sensed that someone was standing behind her. She straightened up, turned around, and saw the appellant. She

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

did not hear appellant enter the room because the bathtub water had been running. H.C. did not know appellant and asked what he wanted. Appellant did not answer. She became scared, raised her hands, and screamed. Appellant grabbed her by the neck, lifted her up by one hand, and pushed her against a wall. Appellant used his other hand to cover her mouth. H.C. thought that appellant was going to strangle her. She resisted and ripped the front of his shirt. She got away from appellant and tried to flee, but appellant pulled her by the hair and threw onto one of the beds in the motel room.

H.C. said she “fell face forward” on the bed and ended up “facing upwards.” Appellant straddled her, hit her in the face, and ripped her bra. She continued to scream and appellant repeatedly said, “[S]hut up.” H.C. used her right knee to move appellant to his side and made an unsuccessful attempt to reach the front door. When she broke away from appellant, he grabbed her by the hair a second time and threw her on the other bed. H.C. bounced off the bed and fell face down on the floor. Appellant straddled H.C. a second time, reached under her blouse, and touched her breast. He then moved his hips back and forth on her hips. At the same time, appellant used a lighter to ignite a glass tube pipe. H.C. pulled on appellant’s finger until she heard a “pop.” He got up and ran out of the motel room. H.C. reported the incident to the motel manager.

H.C. sustained bruises to her face and neck and scratches on her back, side, and upper chest. She estimated the attack lasted about 10 minutes. Modesto Police Officer Mark Phillips responded to the area near the motel to look for a suspect. A community service officer informed Phillips that a suspect matching appellant’s description had been seen less than a mile from the motel. Officer Phillips drove to that area and saw appellant running down an alley. As Phillips approached appellant, he saw that an undercover detective had detained appellant and was taking him into custody. Phillips said appellant’s pants and boxer shorts were down around his ankles at the time of apprehension. Modesto Police Detective Sean Dodge contacted appellant later that day. Detective Dodge testified that appellant had recent injuries to his knuckles and scratches

on his arms. From the window of an ambulance, H.C. later identified appellant as the man who attacked her.

Defense Evidence

Appellant did not offer any documentary or testimonial evidence on his behalf but chose to rely on the state of the prosecution evidence.

DISCUSSION

I. THERE WAS SUFFICIENT EVIDENCE TO CONVICT APPELLANT OF ASSAULT WITH FORCE LIKELY TO CAUSE GREAT BODILY INJURY

Appellant contends he was “guilty of, at most, a simple assault,” because “as the assault was consummated ... the victim did not suffer great bodily injury or anything more than minor injuries.”

A. The Charge

Count 1 of the information charged a violation of section 245, subdivision (a)(1) and alleged that appellant “willfully, unlawfully, and feloniously commit[ted] an assault upon **JANE DOE**, a human being, by means of force likely to produce great bodily injury.” (Emphasis in original.)

B. The Underlying Statute

Section 245, subdivision (a)(1) states:

“Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment.”

C. Case Law of Assault

An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another. (§ 240.) The Supreme Court has held: “Section 245, subdivision (a)(1), punishes assaults committed by the following means: ‘with a deadly weapon or instrument other than a firearm,’ or by ‘any means of force likely to produce great bodily injury.’ One may commit an assault without making actual

physical contact with the person of the victim; because the statute focuses on *use* of a deadly weapon or instrument or, alternatively, on force *likely* to produce great bodily injury, whether the victim in fact suffers any harm is immaterial. [Citation.] That the use of hands or fists alone may support a conviction of assault ‘by means of force likely to produce great bodily injury’ is well established [citations]” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.) The question of whether or not the force used was such as to have been likely to produce great bodily injury is one of fact for the determination of the jury based on all of the evidence, including, but not limited to, the injury inflicted. (*People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1066; *People v. Ausbie* (2004) 123 Cal.App.4th 855, 861.)

D. Analysis

“In assessing a claim of insufficiency of evidence, the reviewing court’s task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578 [].) The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [].) The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792 [].) ‘ “Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the

defendant's guilt beyond a reasonable doubt. ‘ “If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.” ’ [Citation.]” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

Appellant contends the judgment of conviction on count 1 is not supported by substantial evidence because “the bruises on the victim's face and the scratches on her body [citation] are insufficient to show that the force used by appellant was likely to cause great bodily injury; they are simply not a ‘significant or substantial injury.’ ” Appellant cites to this court's opinion in *People v. Duke* (1985) 174 Cal.App.3d 296 (*Duke*) to support his contention.

In *Duke*, the defendant was convicted after a jury trial of section 245, subdivision (a)(1) and other assaultive crimes based on separate assaults of three women. He was sentenced to a total term of imprisonment of five years and appealed, contending in part, that the evidence was insufficient to support the judgment of conviction of assault with force likely to produce great bodily injury. The basis for the conviction was an attack on one Jeri R. The defendant allegedly used a headlock to hold his victim while he touched her breast. The headlock made her feel “choked” but did not cut off her breathing. She could still scream, and she ultimately broke free from the defendant's headlock. The victim did not describe an attempt to choke or strangle her. Her only actual injury was a laceration to her ear lobe caused by her earring being pushed against her ear. This court reversed the judgment of conviction on this count.

We observed:

“It is evident from the statutory definition of the crime, i.e., assault ‘*with force likely to produce great bodily injury*’ ... and the cases construing the statute that we look to the force *actually used* by the appellant to determine if it was likely to cause great bodily injury to the victim. We do not consider the force that the appellant *could* have used against the victim. For example, the fact that appellant could have easily broken Jeri R.'s neck or could have choked her to the point of cutting off her breathing by exerting greater pressure on her neck or windpipe will not support the

conviction of felony assault. This would involve gross speculation on the part of the jury as to what the appellant would have done if he had not stopped of his own accord or had been stopped by outside forces.” (*Duke, supra*, 174 Cal.App.3d at p. 303.)

The court concluded a reasonable jury could not find beyond a reasonable doubt that the headlock used on Jeri R. constituted force likely to produce great bodily injury. The defendant only grabbed her momentarily and released her almost immediately. Jeri R. was in no danger from the force actually exerted on her body. We concluded: “Appellant clearly could have exerted force likely to produce great bodily injury; however, what counts is the force actually exerted, not the threat presented by the defendant’s size and strength.” (*Duke, supra*, 174 Cal.App.3d at p. 303.)

The present case is factually distinguishable from *Duke*. Here, appellant walked up behind H.C. as she was cleaning a bathtub in the interior of a motel room. Appellant grabbed her neck and slammed her body against the wall of the bathroom. Using one hand to grasp H.C.’s neck, he lifted her off of the ground. When she first broke away, appellant grabbed her by the hair and threw her onto one of the beds in the motel room. He jumped on top of H.C. and punched her in the face and head. She briefly freed herself, but appellant grabbed her again by the hair, struck her in the face, and threw her across the motel room. He jumped on top of her a second time and punched her head. Appellant’s attack ended when H.C. pulled appellant’s finger and she heard a “pop,” which led him to flee the motel room.

Appellant contends “it is evident here that the force used was not likely to produce great bodily injury because, quite simply, it didn’t produce great bodily injury.” “One may commit an assault without making actual physical contact with the person of the victim; because the statute focuses on *use* of a deadly weapon or instrument or, alternatively, on force *likely* to produce great bodily injury, whether the victim in fact suffers any harm is immaterial.” (*People v. Aguilar, supra*, 16 Cal.4th at p. 1028.) Here, appellant slammed H.C. against a bathroom wall, punched her in the face and head, grabbed her hair, and lifted her body completely off the ground by grasping her neck with

one hand and thrusting her upward. Appellant’s application of force generated bruises and scratches on H.C.’s body. From these facts, the jury could reasonably infer that appellant’s assault was likely to produce great bodily injury.

The judgment of conviction of assault with force likely to produce great bodily injury is supported by substantial evidence.

II. THE TRIAL COURT COMMITTED SENTENCING ERROR BY IMPOSING A CONCURRENT TERM FOR FALSE IMPRISONMENT

Appellant contends and respondent concedes the trial court erred, under section 654, by imposing a concurrent term of 25 years to life in state prison for the judgment of conviction on count 3, false imprisonment.

We will direct the trial court to stay the concurrent sentence on count 3, to amend the abstract of judgment accordingly, and to transmit certified copies of the amended abstract to all appropriate parties and entities.

III. THE TRIAL COURT DID NOT COMMIT SENTENCING ERROR BY IMPOSING A CONSECUTIVE TERM FOR SEXUAL BATTERY

Appellant contends the trial court erred under section 654 by imposing a consecutive term of 25 years to life in state prison for the judgment of conviction on count 2, sexual battery.

A. Specific Contention

Appellant contends the aggravated assault, the false imprisonment, and the sexual battery were all part of a single course of conduct:

“Appellant’s intent was a sexual battery; the assault and the false imprisonment were simply means of accomplishing that. Although the victim broke away from appellant on two occasions during the assault, appellant’s actions were continuous and all three crimes occurred so close in both time and place as to satisfy the ‘same occasion’ requirement. Each set of crimes ‘were committed in one location, were brief in duration, and were committed essentially simultaneously against the same ... victim []’ (*People v. Lawrence* (2000) 24 Cal.4th 219, 227.)”

B. Section 654

Section 654, subdivision (a), provides:

“An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.”

“ ‘Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.’ [Citation.]” (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208, italics omitted.) “ ‘The question of whether the acts of which [a] defendant has been convicted constitute an indivisible course of conduct is primarily a factual determination, made by the trial court on the basis of its findings concerning the defendant’s intent and objective in committing the acts. This determination will not be reversed on appeal unless unsupported by the evidence presented at trial.’ [Citation.]” (*People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657; see also *People v. McCoy* (1992) 9 Cal.App.4th 1578, 1585 [trial court’s § 654 finding, whether explicit or implicit, may not be reversed if there is substantial supporting evidence].)

Whether there was more than one intent or objective is a question of fact for the trial court and will be upheld on appeal if there is substantial evidence to support it. (*People v. Nelson* (1989) 211 Cal.App.3d 634, 638.) Where the trial court does not make an express finding, an implied finding that the crimes were divisible must be upheld if supported by the evidence. (*Ibid.*) “We review the trial court’s findings ‘in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]’ [Citation.]” (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085.)

C. Analysis

Assault with force likely to produce great bodily injury (§ 245, subd. (a)(1)), as charged in count 1, is a general intent offense. The defendant need only have the general intent to willfully commit an act, the direct, natural, and probable consequences of which, if successfully completed, would be the injury to another. (*People v. Miller* (2008) 164 Cal.App.4th 653, 662; *People v. Golde* (2008) 163 Cal.App.4th 101, 108-109.) The gravamen of the offense is the likelihood that great bodily injury will result from the force applied, not that an injury actually occurred. (*People v. Chambers* (1964) 231 Cal.App.2d 23, 27.) Sexual battery (§ 243.4, subd. (a)), as charged in count 2, is a specific intent crime. The crime consists of touching an intimate part of another, against the victim's will, committed for the purposes of sexual arousal, gratification, or abuse. (*People v. Chavez* (2000) 84 Cal.App.4th 25, 29.)

The trial court did not make an express finding as to the divisibility of the crimes charged in counts 1 and 2. A trial court's implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence. (*People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1310.) The crimes charged in counts 1 and 2 in this case entailed different intents and objectives. Appellant committed assault by engaging in violent conduct with H.C. in the bathroom and by grabbing her by the neck and slamming her against the wall. He committed sexual battery in the bedroom by moving his hips and waist back and forth over her the backside of her waist area and touching her breast. The court could have reasonably concluded that appellant possessed an assaultive intent at the inception of the physical encounter and that the intent shifted to one sexual in nature as encounter continued.

The trial court did not violate section 654 by imposing consecutive terms on counts 1 and 2.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DECLINING TO STRIKE ONE OF THE PRIOR STRIKE CONVICTIONS

Appellant contends the trial court abused its discretion in refusing to strike one of his prior convictions.

A. Procedural History

On March 14, 2011, appellant filed a combined sentencing brief and motion² under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, requesting the court to strike both of his alleged prior convictions under section 667, subdivision (d). Appellant acknowledged his current offense was “undeniably a serious one” but asked the court for leniency, noting at the time of the offenses he “was under the influence of a drug as a result of his long-battled drug addiction. But for his altered state the offense would likely not have occurred.” Appellant noted he “had a difficult childhood and as a result developed an unrelenting drug habit.” On March 25, 2011, the People filed written opposition to the motion, noting appellant’s lengthy criminal history and pointing out his strike priors are both violent and serious.

On March 29, 2011, the court ruled:

“I’m going to deny the *Romero* motion to strike the strikes on the following grounds:

“His first strike was in 1983, then he had another conviction in 1984, 1986, and 1989. He was convicted of two other felonies receiving local time in both of those cases.

“1992, Mr. Tribble was sentenced to the state prison.

² Section 1385 provides for the magistrate or judge to exercise his or her authority to dismiss a complaint in furtherance of justice, on his or her own motion or upon the application of the prosecuting attorney. (§ 1385, subd. (a).) However, under settled case law, a defendant may informally suggest that the magistrate or judge consider dismissal on the magistrate or judge’s own motion. (*Polanski v. Superior Court* (2009) 180 Cal.App.4th 507, 527.)

“1994, he had two misdemeanor convictions, had three parole violations in 1994, one in 1996. 1997 he was sentenced to the state prison for 16 months. Had a parole violation in 1998.

“1998 he received two years state prison on a registration case, appeared to be concurrent with a three-year state prison on a new sex strike offense, and then he had two parole violations in 2001.

“In 2003, he was committed as a sexually violent predator for two years.

“And 2008 Mr. Tribble was before this court and received an offer from the prosecution to give him 16 months state prison for a 290.

“And whenever I take a plea and strike strikes, I inform the defendant that the strikes are gone for this case and this case only, and that they would come back if a new felony offense occurs. And in spite of that, Mr. Tribble had two parole violation[s] in 2009 after his release. And what’s the most troubling to the Court is that Mr. Tribble was out three days from the state prison and was on electronic monitoring when this crime occurred. And based on those issues, the Court is denying the strike.

“Mr. Tribble obviously has not learned his lesson. This woman was trying to do her job and is obviously very traumatized by what happened.”

B. Appellant’s Contention on Appeal

Appellant contends he falls outside the spirit of the “Three Strikes” law:

“Appellant is 47 years old and is facing a long prison commit[ment] even if one of his strike priors are struck.... [¶] Appellant clearly needs a treatment program for his drug addiction. The people of the State of California have recognized the need to treat drug users. That is why they passed Proposition 36, to provide for treatment of drug users. It serves little purpose to incarcerate an aging drug offender such as appellant for life. It punishes him for his addiction without ever providing the opportunity to rehabilitate.

“While appellant’s current offenses are serious, considering both the circumstances of the instant offenses and appellant’s history, it is reasonable to conclude that appellant is not an evil, revolving door criminal within the meaning of the ‘Three Strikes’ law.”

C. Applicable Law

“ [T]he Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court “conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme.” ’ [Citation.]” (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).

Section 1385 permits the trial court to exercise its discretion and dismiss a prior strike conviction in furtherance of justice. (§ 1385, subd. (a); *People v. Williams* (1998) 17 Cal.4th 148, 158-159 (*Williams*); *Romero, supra*, 13 Cal.4th at pp. 529-530.) A defendant has no right to make a motion and the court has no obligation to make a ruling under section 1385, but the defendant may “ ‘invite the court to exercise its power’ ” under the statute to dismiss the prior strike conviction. (*Carmony, supra*, 33 Cal.4th at p. 375.)

We review a ruling upon a motion to strike a prior felony conviction under a deferential abuse of discretion standard. (*Williams, supra*, 17 Cal.4th at p. 162.) 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 [presumption that trial court acts to achieve lawful sentencing objectives].) We do not substitute our decision for that of the trial court. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) “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.” (*Carmony, supra*, 33 Cal.4th at p. 377.)

D. Analysis

We find no indication in the record that the trial court did not properly weigh the various factors. The jury found appellant guilty of assaulting H.C. with force likely to

produce great bodily injury and unlawfully touching an intimate part of her person while he unlawfully restrained her against her will. Appellant snuck up behind H.C. as she pursued her work as a motel housekeeper. Among other things, he grabbed H.C. by the neck, slammed her into a wall, and lifted her off the ground using a single hand around her neck. H.C. briefly freed herself from appellant's grip. However, he caught her and then threw her around the motel room that she had been cleaning. Appellant punched H.C. in the face and head. He also restrained her and touched her breast against her will. As appellant grabbed H.C., he attempted to smoke a substance from a glass pipe.

In addition to the circumstances of the underlying offenses, appellant had a lengthy criminal record, as noted by the trial court. In 1983, he sustained a felony conviction for lewd or lascivious conduct on a child under age 14. In 1984, he was convicted of three counts of assault. In 1986, he was convicted of the felony sale of a controlled substance. In 1989, he was convicted of misdemeanor battery. In 1991, appellant sustained a conviction of felony possession of a controlled substance. The superior court granted appellant probation and committed him to county jail for the foregoing offenses.

In 1992, appellant was convicted of felony possession of a controlled substance and sentenced to 16 months in state prison. In 1994, appellant was convicted of several misdemeanor offenses and had three parole violations. He had another parole violation in 1996. The following year, appellant was convicted of fleeing the scene of a vehicular accident and was sentenced to 16 months in state prison. In 1998, appellant was convicted of a sex offender violation and sustained another conviction for lewd or lascivious conduct on a child under age 14, for which he was committed to state prison for a total term of five years. In 2001, he committed multiple parole violations. In 2003, appellant sustained a two-year commitment to Atascadero State Hospital as a sexually violent predator (SVP).

In 2008, appellant sustained another felony conviction for violation of a sex offender registration statute. At that time, appellant was subject to a potential 25-year-to-life sentence under the Three Strikes law. Instead, appellant's counsel and the prosecutor negotiated a plea arrangement by which the trial court agreed to strike appellant's prior strikes for purposes of punishment. Judge Ricardo Cordova presided at both the 2008 case and appellant's current case. Judge Cordova imposed a 16-month term in state prison during the 2008 case. Appellant violated parole on two occasions in 2009 and returned to state prison. He was released from state prison in August 2009, and committed offenses charged in this case just three days after his release.

At the March 29, 2011 hearing, the court stated it had considered the written motion and opposition to strike. From the foregoing summary of facts and circumstances, it appears quite clear that the trial court did consider all of the relevant factors. And since it did so, it did not act arbitrarily or capriciously in denying appellant's motion to strike his prior conviction. Accordingly, the trial court did not abuse its discretion in denying the *Romero* motion. (*People v. Jordan* (1986) 42 Cal.3d 308, 318.)

DISPOSITION

The judgment is affirmed. The superior court is directed to stay the concurrent term on count 3 pursuant to section 654, amend the abstract of judgment accordingly,

and transmit certified copies of the amended abstract to all appropriate parties and entities.

Poochigian, J.

WE CONCUR:

Gomes, Acting P.J.

Detjen, J.