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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

SHANNON DION SHINE,

Defendant and Appellant.

F063159

(Super. Ct. No. 09CM0070)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. James T. Laporte, Judge.

Kim Malcheski, 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, Michael A. Canzoneri and Barton Bowers, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Poochigian, J. and Franson, J.

INTRODUCTION

Appellant/defendant Shannon Dion Shine was convicted of count II, corporal injury to a cohabitant with a prior conviction (Pen. Code,¹ § 273.5, subds. (a), (c)); count III, assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)); and count IV, corporal injury to a cohabitant with a prior conviction (§ 273.5, subd. (a)). He had three prior strike convictions and one prior prison term enhancement. He was sentenced to an aggregate third strike term of 50 years to life plus one year for the enhancement.

On appeal, defendant argues the court erroneously admitted evidence of his prior acts of domestic violence as propensity evidence pursuant to Evidence Code section 1109, and asserts such evidence violated his constitutional right to due process. Defendant also contends the court abused its discretion when it declined to dismiss his prior strike convictions and instead imposed two third strike terms. We will affirm.

FACTS

In the summer of 2008, P.A. was involved in a romantic relationship with defendant. Defendant and P.A. lived together in her apartment in Lemoore, and defendant had his own key to her apartment. Defendant and P.A. occasionally argued. On one occasion, defendant scared P.A. and she ran out of the room. However, there had never been any physical violence in their relationship.

Incident of August 17, 2008 (count IV)

In the early morning hours of August 17, 2008, P.A. locked herself out of her apartment. P.A. walked to a nearby store and called defendant, who was at a friend's house in Merced. She asked defendant to return to Lemoore to use his own key so she could get back into her apartment. Defendant agreed and had someone give him a ride back to Lemoore.

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

P.A. testified that defendant returned to the apartment about three hours later. When defendant arrived, he started “talking smack” because he was angry about having to return to Lemoore. P.A. testified that defendant used his cell phone to record himself as he repeatedly said that he was going to “woop” her. Defendant and P.A. verbally argued as they walked upstairs to the apartment. Defendant unlocked the apartment with his key, closed the door, and locked P.A. out for a few minutes. Defendant emerged from the apartment and said he was going to leave in P.A.’s van. P.A. objected and they argued about whether he could use her van. Defendant told P.A. that she better stop arguing.

P.A. testified that defendant went downstairs and headed for her van. P.A. followed him and repeatedly told him not to take her van. P.A. testified that defendant pushed her to the ground and into mud. When P.A. tried to get up, defendant “stomped” her down into the mud more than once. Defendant grabbed P.A.’s hair and tried to drag her. P.A. said he was going to pull her hair out. Defendant replied, “Good.” Defendant eventually left in P.A.’s van.

After defendant left, P.A. went to the nearby apartment of Dorris Johnson, who was also the property manager. P.A. told Johnson what happened. P.A. was frightened and asked Johnson not to let defendant or anyone else in the apartment. P.A. was muddy, and she had scratches on her arm and a bruise on her side. Johnson encouraged P.A. to go to the hospital. P.A. refused and stayed with Johnson almost the entire day.

Later that evening, P.A. went to the hospital for treatment of her injuries. She told medical personnel that she suffered the bruise while doing “hip hop aerobics” at home. P.A. testified she lied because she was scared and terrified of defendant.

Text messages

P.A. testified she had previously programmed defendant’s cell phone number into her cell phone. She identified the contact as “Deon,” misspelling defendant’s middle name of “Dion.” P.A. testified that she received a series of threatening text messages

from “Deon,” beginning on August 17, 2008, and continuing into September 2008. She also received a threatening text message that was directed to Dorris Johnson.

On September 9, 2008, P.A. received a text message from “Deon,” in which he threatened to “[t]orch” her apartment. P.A. believed defendant was capable of doing it. Another message stated: “ ‘I not known for playin [*sic*].’ ” Yet another message stated: “ ‘I figure eventually you would get tired of getting your ass wooped and straight up,’ ” and “ ‘I’ma knock you out.’ ”

Incident of September 11, 2008 (counts II & III)

P.A. testified about an assaultive incident which occurred on September 11, 2008. Defendant called P.A. at her apartment and asked to use her van. P.A. refused. Defendant asked if he should pick up his things from the apartment. P.A. replied, “ ‘If that’s what you want.’ ” Defendant said he was on his way.

P.A. testified she was in bed when defendant arrived at her apartment. Defendant was angry, and they argued as he gathered his belongings. Defendant suddenly rushed to the bed and started to hit P.A. Defendant hit P.A. in the face with a closed fist more than once. As defendant hit her, P.A. repeatedly asked defendant, “ ‘What did I do? What did I do?’ ”

P.A.’s 14-year-old daughter was in the apartment, and she heard P.A. crying. The girl looked toward the bedroom and saw the bed moving. She went to the doorway but someone closed the bedroom door. She knocked and asked what was wrong. P.A. was still in bed, and she asked defendant if she could tell her daughter that she was okay. Defendant replied, “ ‘You’re not okay.’ ” P.A.’s daughter testified that she heard part of this exchange.

P.A. asked defendant to get some ice for her. Defendant replied, “ ‘You don’t need any ice.’ ” Defendant left the apartment and drove away in P.A.’s van.

P.A. testified she suffered bruises on her face. She went to the emergency room, and again told hospital personnel that she suffered the injuries doing “hip hop aerobics” at home. P.A. testified that she lied because she was still afraid of defendant.

Dorris Johnson saw P.A. after she returned from the hospital. P.A. had bruises and an injury on her forehead, black eyes, and appeared to be in shock.

P.A.’s report to the police

On September 12, 2008, P.A. went to the Hanford Police Department to report the assaults. P.A. testified she went to Hanford instead of Lemoore because she was afraid defendant would see her or find out that she was talking to the police. P.A. spoke to Officer Alvaro Santos from the Lemoore Police Department. They went back to Lemoore for the interview.

Santos testified P.A. was shaking, crying, and very upset. As Santos interviewed P.A., she received a text message from “Deon” which stated: “ ‘You ready for round two?’ ”²

Prior domestic violence incident

K.L. testified that she dated defendant in 2004 during which time defendant physically assaulted her. He hit her more than once and he hit her in the face with his hands. He threatened her, and he told her, “ ‘You think this is over but it’s not.’ ” K.L. testified she sought medical attention as a result of the attack.

Expert testimony

Pamela Tejada testified she was the victim/witness advocate coordinator for Lemoore Naval Air Station, and she had previously testified in other cases as an expert in domestic violence. Tejada testified that in her experience, it was common for victims to

² Defendant was also charged with count I, criminal threats (§ 422), but the jury was unable to reach a verdict on that count, a mistrial was declared, and the court later granted the prosecution’s motion to dismiss the charge.

lie about domestic violence to health care providers because they typically do not want to send a loved one to jail.

DEFENSE EVIDENCE

Amanda Murphy testified she met defendant for the first time on September 11, 2008. Defendant was driving a friend's van and picked her up at a park. They spent the entire afternoon and evening together, and spent time with defendant's friends, Eric Bruce, Sandra Briceno, and Rodolfo Valdez.

Murphy testified that they were stopped by Lemoore police officers that evening because the van's registration tags were expired. Defendant dropped off Murphy at her mother's house around 3:00 a.m. the next morning. Murphy testified she had only met defendant twice, but she thought he was a really good person.

Bruce, Briceno, and Valdez testified that they spent the evening with defendant and Murphy, although their accounts were somewhat inconsistent with Murphy's testimony about their activities that night.

Defendant's trial testimony

Defendant admitted he had five prior felony convictions, which were for domestic violence, false imprisonment, criminal threat, and two counts of assault with force likely to produce great bodily injury. He went to prison in 2004. Defendant admitted he hit K.L. in the face more than once, but claimed he did so because she cut him with a knife. Defendant complained that he was the only person who went to jail even though K.L. was also fighting.

Defendant testified he had been in a dating relationship with P.A., but he only stayed at her apartment a couple of times, and he did not have a key. Defendant and P.A.'s former husband were good friends, and he was upset when defendant started to date P.A. P.A. allowed defendant to use her van. Defendant ended their relationship in mid-August 2008, and she was unhappy about it. Defendant testified that P.A. was an alcoholic. She regularly threatened to do something to cause a violation of his parole.

Defendant testified that he did not assault P.A. On August 17, 2008, he was with his grandparents in Hanford; he was not in Merced. P.A. called him for help, but he did not have a key to unlock her apartment. Defendant testified he never went to her apartment, and they did not have an altercation that day.

Defendant testified that on September 11, 2008, he briefly saw P.A. in the mid-afternoon. He borrowed her van with permission. He spent the rest of the day with Murphy and his friends. He was pulled over by the police for driving with expired tags. The police searched the car, and he was not arrested. He took Murphy home around 3:00 a.m., returned the van to P.A., and left with a friend. Defendant was impeached with inconsistencies between his testimony and the accounts of Murphy and Bruce about their activities.

Defendant testified he lost his cell phone on September 7, 2008, while he was at a car show. The next day, he bought a cell phone with a different number. He denied sending any of the threatening text messages to P.A., including those received by P.A. before he lost his cell phone.

Defendant claimed P.A. lied about everything because she had mental issues, and P.A. likely coerced her daughter so she would also make accusations against him.

Rebuttal evidence

Officer Santos testified that he obtained P.A.'s cell phone on September 12, 2008. It contained a contact for "Deon" with a particular phone number. The next day, he called that number and asked for Dion. A man answered and said "yeah." Santos asked if he was speaking with "Shannon Dion," and the man hung up. Santos called again and reached voice mail. He left a message identifying himself as a police officer and asked for a return call. No one ever called back.

DISCUSSION

I. The court properly admitted K.L.'s testimony

Defendant contends the trial court violated his due process rights when it permitted K.L. to testify that he committed prior acts of domestic violence against her, and then instructed the jury that it could consider her testimony as disposition evidence.

A. Background

During pretrial motions, defense counsel objected to the prosecution's intent to call K.L. to testify about defendant's prior acts of domestic violence. Counsel argued such disposition evidence was irrelevant and highly prejudicial. The prosecutor replied that Evidence Code section 1109 specifically provided for the admission of disposition evidence in domestic violence cases. The court deferred ruling on the matter until later in the trial.

During the course of trial, the court addressed the admissibility of K.L.'s testimony. Defense counsel argued the details of the prior incident were prejudicial and read a lengthy account from the probation report about defendant's assault on K.L., as an offer of proof of her proposed testimony for the prosecution.

According to the report, defendant told K.L. he would beat her until she was dead, and he would leave her in the mountains where no one would find her. Defendant repeatedly hit her with a belt. He decided that she wasn't being hurt enough, and removed her clothing and directly hit her body with the belt several times. He repeatedly slapped both sides of her face and said he was going to make sure her left side matched her right side. He found some Q-Tips, pushed one in her ear, and said he was going to shove it in.

Also according to the probation report, K.L. stated that defendant stopped pushing the Q-Tip when he saw blood coming out of her ear. Defendant obtained a bottle of stain cleaner, and sprayed it over K.L.'s body and hair to get rid of the blood stains. He cut the bloody pieces of her hair with scissors, and threatened to shave her head. He started to

shave her head, and then told her to get into the shower and wash off the blood. Defendant poured bleach in the shower and told K.L. to stand in it. K.L. got out of the shower, dressed, and tried to get out of the apartment. Defendant grabbed the back of her head and slammed her into a wall. K.L. said defendant beat her worse than before. He found some fireworks in the apartment, and said he was going to place them in her and light them when she was asleep. Defendant then grabbed a pair of pliers and threatened to pull out K.L.'s teeth. K.L. begged him to stop and he did. He went to bed and said, " 'You think this is over but it's not,' " and said it could last for days. After he fell asleep, K.L. escaped from the apartment and asked a neighbor for help.

After defense counsel read the probation report's account, the prosecutor clarified that he was not going to introduce the entirety of the evidence about defendant's assault on K.L. Instead, he only intended to ask K.L. general questions about her relationship with defendant, which only required yes or no answers as to whether he committed any acts of violence against her, hit her, and threatened her. Defense counsel replied that such evidence would not be unduly inflammatory, and he would allow the prosecutor to lead K.L.'s testimony to ensure that she would not discuss the more prejudicial acts. The prosecutor agreed that he would not ask any questions about the Q-Tips, the fireworks, the belt, and pouring bleach on the victim.

The court asked defense counsel if he was still raising an objection pursuant to Evidence Code section 352. Defense counsel withdrew his objections based on the prosecutor's stated intent to limit the evidence.

As set forth *ante*, K.L. simply testified that she dated defendant in 2004; that defendant physically assaulted her; that he hit her more than once; that he hit her in the face with his hands; that he threatened her; and that he told her, " 'You think this is over but it's not.' " K.L. sought medical attention because of the attack. The prosecutor asked leading questions, defense counsel did not object, and defense counsel did not cross-examine K.L.

Also as set forth *ante*, defendant testified at trial and admitted he hit K.L. However, he insisted that the incident occurred because K.L. cut him with a knife, and he hit her in the face as a reaction.

After defendant testified, the prosecutor argued defendant's self-defense claim had opened the door to introduce the rest of the details about his assault on K.L. Defense counsel vigorously objected and again argued the details were unduly prejudicial.

After the parties argued the matter, the prosecutor decided to withdraw his request to introduce the details about defendant's assault on K.L., "[i]n order to expedite the matter." The prosecutor was satisfied with the extent of K.L.'s previous testimony. K.L. was not recalled and no further evidence about defendant's assault on K.L. was introduced.

During the instructional phase, the court gave the jury CALCRIM No. 852 as to the consideration of K.L.'s testimony: "The People presented evidence that the defendant committed domestic violence that was not charged in this case specifically the 2004 incident involving [K.L.]" The court defined the terms domestic violence, abuse, and cohabitants, and further instructed:

"You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

"If the People have not met this burden of proof, you must disregard this evidence entirely.

"If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from the evidence that the defendant was disposed or inclined to commit domestic violence and, based on the decision, also conclude that the defendant likely to commit and did commit Counts 1-4, as charged here. If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not

sufficient by itself to prove that the defendant is guilty of Counts 1-4 as charged here. The People must still prove each charge and allegation beyond a reasonable doubt.”

B. Analysis

Defendant contends the court committed federal constitutional error by admitting K.L.’s testimony because it constituted unlawful character evidence, and CALCRIM No. 852 erroneously instructed the jury that it “may” conclude that he was disposed to commit domestic violence. Defendant further argues defense counsel was prejudicially ineffective for failing to raise these objections. Defendant concedes numerous courts have rejected similar challenges to Evidence Code section 1109, but he raises the issue to preserve it for possible federal habeas review.

Evidence Code section 1109, subdivision (a)(1) provides in relevant part that, in certain exceptions not applicable to this case: “[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant’s commission of other domestic violence is not made inadmissible by [Evidence Code] Section 1101 if the evidence is not inadmissible pursuant to [Evidence Code] Section 352.”

“Domestic violence is but one of the areas in which the rules of evidence have been relaxed in recent years. [Evidence Code] Section 1109, subdivisions (a)(2) and (a)(3) allow admission of prior incidents of elder abuse and child abuse when the defendant is currently charged with a like offense, and [Evidence Code] section 1108 provides a similar evidentiary exception for past commission of sexual offenses when the defendant is being tried for a sexual offense. [¶] These statutes are remarkable not because they allow testimony about prior misconduct, but because they allow the jury to draw propensity inferences from the prior acts. [Citation.]” (*People v. Johnson* (2010) 185 Cal.App.4th 520, 528-529.)

“[Evidence Code] Section 1108 is modeled on rules 413 through 415 of the Federal Rules of Evidence, which were enacted in 1994. [Citations.] Rule 413,

subdivision (a) provides that in a criminal case in which the defendant is accused of an offense of sexual assault, ‘evidence of the defendant’s commission of another offense or offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.’ Rule 414 applies the same rule of admissibility to criminal child molestation cases. Rule 415 allows plaintiffs to proffer such evidence in civil cases involving sexual assault or child molestation.” (*People v. Soto* (1998) 64 Cal.App.4th 966, 980.)

As noted by the People, and conceded to by defendant, the admissibility of propensity evidence pursuant to Evidence Code sections 1108 and 1109 has repeatedly been found constitutional and not in violation of due process. (See e.g., *People v. Falsetta* (1999) 21 Cal.4th 903, 912-922; *People v. Johnson, supra*, 185 Cal.App.4th at pp. 528-529; *People v. Williams* (2008) 159 Cal.App.4th 141, 147; *People v. Cabrera* (2007) 152 Cal.App.4th 695, 704; *People v. Flores* (2009) 176 Cal.App.4th 1171, 1180-1181; see also *Schroeder v. Tilton* (9th Cir. 2007) 493 F.3d 1083, 1088 [admission of propensity evidence pursuant to Evidence Code section 1108 did not violate prohibition against ex post facto laws].)

Defendant’s constitutional challenge to Evidence Code section 1109 is based on *McKinney v. Rees* (1993) 993 F.2d 1378 (*McKinney*). As explained in *People v. Holford* (2012) 203 Cal.App.4th 155 (*Holford*), however, defendant’s reliance on *McKinney* is misplaced because *McKinney* was decided “before enactment of the federal rules allowing evidence of uncharged sexual assaults and child molestation and the enactment of section 1108” (*Holford, supra*, 203 Cal.App.4th at p. 183, fn. 19.) “The application of *McKinney*’s holding in the context of [Evidence Code] section 1108 evidence has been repeatedly rejected. [Citations.] The Ninth Circuit and other federal courts have long since upheld the constitutionality of the federal rules allowing sexual misconduct evidence to establish propensity to commit such crimes. [Citations.]” (*Ibid.*)

Similarly, defendant's challenges to CALCRIM No. 852 and its predecessor instructions have also been rejected. (See *People v. Johnson* (2008) 164 Cal.App.4th 731, 738-740.)

While defendant has not challenged K.L.'s actual trial testimony, we note that testimony was admissible as propensity evidence in this domestic violence case pursuant to Evidence Code section 1109, and it was not prejudicial pursuant to Evidence Code section 352. Given the prosecutor's agreement to limit K.L.'s testimony, and the withdrawal of his subsequent motion to reopen, the jury heard extremely limited propensity evidence that defendant had previously hit and threatened K.L. Such limited testimony was no more prejudicial or inflammatory than the charged offenses and P.A.'s testimony about defendant's two assaults upon her. (See, e.g., *People v. Jones* (2012) 54 Cal.4th 1, 50-51.)

We thus reject defendant's constitutional challenges and similarly find that defense counsel was not prejudicially ineffective for failing to raise these issues during trial.

II. The court properly rejected defendant's request to dismiss his prior strike convictions

Defendant contends the court abused its discretion when it declined to dismiss his three prior strike convictions and instead imposed an aggregate third strike term of 50 years to life.

A. The prior strike convictions

As to all counts, the information alleged that defendant had three prior strike convictions, all of which were from the K.L. case in October 2004: two convictions for assault with force likely to produce great bodily injury (§ 245, subd. (a)(1)) and one conviction for criminal threats (§ 422). He also served a prior prison term, again based on the same case.

During the course of trial, defendant admitted the prior conviction allegations.

After he was convicted, defendant filed a request for the court to dismiss the 2004 prior strike convictions pursuant to section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). Defendant argued his record did not show a lengthy record of criminal activity, he engaged in a brief period of criminal activity involving the assault on K.L., and his current offenses did not involve the infliction of permanent injury.

B. The probation report

According to the probation report, defendant had a prior conviction in December 1994 for two misdemeanors: possession of less than one ounce of marijuana (Health & Saf. Code, § 11357, subd. (b)) and failing to appear (§ 853.7). He was placed on probation.

In August 1995, he was convicted of misdemeanor battery (§ 242) and granted diversion. In 1996, he failed diversion and the charges were reinstated. He was arrested on a bench warrant and placed on probation for three years in 1997. In 1998 and 1999, he violated probation and probation was reinstated.

In January 1997, he was convicted of misdemeanor giving a false identification to a peace officer (§ 148.9, subd. (b)) and sentenced to jail.

In April 1995, he was convicted of misdemeanor fighting in a public place (§ 415, subd. (1)) and placed on probation for two years.

In November 2004, defendant was convicted of five felony offenses arising from the assault on K.L., three of which were alleged as strikes in this case: two counts of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)); criminal threats (§ 422); corporal injury on a cohabitant (§ 273.5, subd. (a)); and false imprisonment (§ 236). He was sentenced to five years four months in prison. In April 2007, he was released on parole, and he was still on parole when he committed the offenses in this case.

According to the probation report, defendant was 35 years old. He had obtained a certificate of completion from the San Francisco Culinary School. He was last employed by a construction company in Tulare in 2008. Defendant said that he drank beer, but he did not use drugs.

The probation report recommended two consecutive third strike terms of 25 years to life for both counts II and IV.

C. The sentencing hearing

At the sentencing hearing, the court reviewed the probation report and acknowledged defendant's *Romero* request and his argument that he had engaged in a relatively brief period of criminal activity. The prosecutor replied that defendant's prior history and the facts of this case "pretty much speaks for itself" and there was no basis to dismiss the prior strike convictions. As to defendant's prior assault on K.L., the prosecutor clarified that defendant was convicted of two counts of assault with a deadly weapon for, respectively, using fireworks and pliers.

The court rejected defendant's request to dismiss the prior strike convictions, and found he came within "the spirit and letter of the Three Strikes Statute." The court noted defendant's prior strikes were based on the assault on K.L. The court reviewed the report about that assault, and found that it was "fair to say she was brutalized in the circumstances of her ordeal when she was at the hand of [defendant]." The court noted that defendant was not convicted based on a single assault on K.L., but a series of assaults and attacks committed during a long ordeal. The court found his prior abuse of K.L. was violent and life-threatening.

The court also found the current offenses involved the same type of crimes committed against a cohabitant. "The repetition of criminal activity suggests that he did not learn from his prior experience with the criminal justice system." The court concluded that defendant's *Romero* request should be denied because "the current offense is of the same type of crime that the defendant committed in the past." The court

imposed consecutive third strike terms of 25 years to life for both counts II and IV, a concurrent third strike term for count III, and one year for the prior prison term enhancement.

D. Analysis

A trial court's refusal to dismiss a prior strike conviction under section 1385 is subject to review under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374, 375 (*Carmony*)). “In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ‘ “[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” ’ [Citations.] Second, a ‘ “decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’ ” ’ [Citations.] Taken together, these precepts establish that 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 pp. 376-377.)

“Consistent with the language of and the legislative intent behind the three strikes law, we have established stringent standards that sentencing courts must follow in order to find such an exception. ‘[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, “in furtherance of justice” pursuant to ... section 1385(a), or in reviewing such a ruling, 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.’ [Citation.]” (*Carmony, supra*, 33 Cal.4th at p. 377.)

“Thus, 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. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper.

“In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not ‘aware of its discretion’ to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]. Moreover, ‘the sentencing norms [established by the Three Strikes law may, as a matter of law,] produce [] an “arbitrary, capricious or patently absurd” result’ under the specific facts of a particular case. [Citation.]

“But ‘[i]t is not enough to show that reasonable people might disagree about whether to strike one or more’ prior conviction allegations. [Citation.] Where the record is silent [citation], or ‘[w]here 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’ [citation]. Because the circumstances must be ‘extraordinary ... by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack’ [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary. Of course, in such an extraordinary case—where the relevant factors described in *Williams, supra*, 17 Cal.4th 148 ... manifestly support the striking of a prior conviction and no reasonable minds could differ—the failure to strike would constitute an abuse of discretion.” (*Carmony, supra*, 33 Cal.4th at p. 378.)

As in *Carmony*, this case “is far from extraordinary.” (*Carmony, supra*, 33 Cal.4th at p. 378.) The trial court herein balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law. (*Ibid.*) Based on defendant’s criminal record, the brutality of his assaults upon K.L. and P.A., and his failed

performance on parole, the court reasonably concluded it should not grant the *Romero* motion. Once a career criminal commits the requisite number of strikes, the circumstance must be “extraordinary” before he can be deemed to fall outside the spirit of the Three Strikes law. (*Id.* at pp. 377-378.) Defendant has failed to show the court abused its discretion in denying the *Romero* motion. (*Id.* at p. 377; *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

Defendant contends the court abused its discretion because it solely focused on his prior strike convictions and the current offenses, while ignoring other possible mitigating circumstances. A similar argument was rejected in *People v. Myers* (1999) 69 Cal.App.4th 305, 310, which noted that the trial court in that case had read and considered defendant’s motion, which raised certain mitigating circumstances, but still decided to deny his request to dismiss the prior strikes:

“The court is presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary. [Citation.] Thus, the fact that the court focused its explanatory comments on the violence and potential violence of appellant’s crimes does not mean that it considered only that factor. Accordingly, appellant has not demonstrated that the trial court abused its discretion in denying his motion to strike prior convictions.” (*Id.* at p. 310.)

In this case, as in *Myers*, the court stated that it had reviewed defendant’s request to dismiss the prior strikes, made extensive findings, and denied that request.

Defendant also complains that a life sentence was not appropriate in this case because his current offenses and prior strike convictions were for domestic violence. As noted by the People, defendant “is not subject to a life sentence merely on the basis of his current offense but on the basis of his recidivist behavior. Recidivism in the commission of multiple felonies poses a manifest danger to society justifying the imposition of longer sentences for subsequent offenses. [Citation.]” (*People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630.) Moreover, felony offenses arising from domestic violence constitute strikes

if those felonies are serious or violent, and may trigger a third strike term under the circumstances. (See, e.g., *People v. Laino* (2004) 32 Cal.4th 878, 895-898.)

Defendant further argues the court failed to consider that he was only 35 years old at the time of sentencing, with a potential life expectancy of only 60 to 63 years, and that his third strike term is the functional equivalent of life without parole. Again, as noted by the People, a similar argument was rejected in *People v. Strong* (2001) 87 Cal.App.4th 328, 345, where the court held that “middle age, considered alone, does not remove a defendant from the spirit of the Three Strikes law. Otherwise, those criminals with the longest criminal records over the longest period of time would have a built-in argument that the very factor that takes them within the spirit of the Three Strikes law – a lengthy criminal career – has the inevitable consequence – middle age – that takes them outside the law’s spirit.” *Strong* further held that “reliance on a statistical assumption would appear to clash with the obligation in *Williams* to review the defendant’s individual circumstances for purposes of determining whether he is one of the exceptions who should be deemed outside the spirit of the law.” (*Ibid.*)

Finally, we reject defendant’s alternate argument that his defense counsel was prejudicially ineffective for not raising these specific issues to the court at the sentencing hearing. The court did not abuse its discretion when it denied his request to dismiss his prior strike convictions, and defense counsel’s failure to raise specific arguments was not prejudicial given the entirety of the record.

DISPOSITION

The judgment is affirmed.