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

THE PEOPLE,

Plaintiff and Respondent,

v.

REYNALDO SALDANA RICO,

Defendant and Appellant.

F063173

(Super. Ct. No. BF125457A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. H.A. Staley, Judge. (Retired judge of the Kern Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

James F. Johnson, 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.

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

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On October 21, 2008, Reynaldo Saldana Rico beat his wife.¹ A jury found him guilty of willful infliction of corporal injury and found a great-bodily-injury allegation true. He admitted an attempted second degree robbery prior, both as a serious-felony prior and as a strike prior, and admitted a domestic-violence prior. The court imposed and stayed a five-year serious-felony-prior term on the attempted second degree robbery prior and imposed an aggregate sentence of 12 years.

On his first appeal, Rico challenged the sentence, arguing that the court had no authority to stay the five-year serious-felony-prior term on the attempted second degree robbery prior. The Attorney General agreed. We concurred, affirmed the judgment, vacated the sentence, and remanded for resentencing. (*People v. Rico* (Mar. 21, 2011, F059362) [nonpub. opn.]²)

After remand, the court declined to strike Rico's strike prior and imposed an aggregate sentence of 12 years. On his second appeal, he argues that by not striking his strike prior the court committed an abuse of discretion that constitutes constitutionally disproportionate punishment under both the federal and state constitutions. We affirm.

BACKGROUND

On March 25, 2009, the district attorney filed an information charging Rico with committing assault with a deadly weapon (count 1; Pen. Code, § 245, subd. (a)(1)),³ willful infliction of corporal injury on a spouse (count 2; § 273.5, subd. (a)), and willful child endangerment (count 3; § 273a, subd. (b)) on October 21, 2008. The information alleged, in counts 1 and 2, willful infliction of domestic-violence great bodily injury

¹ Additional facts, as relevant, are in the discussion (*post*).

² On December 2011, we granted Rico's request to take judicial notice of the record in that appeal.

³ Later statutory references are to the Penal Code.

(§ 12022.7, subd. (e)) and a 1996 attempted second degree robbery prior as a strike prior (§§ 211, 212.5, subd. (c), 667, subs. (b)-(i), 1170.12, subs. (a)-(d)) and, in count 2, a 2008 willful infliction of corporal injury on a spouse prior as a domestic violence prior (§§ 273.5, subs. (a), (e)(1)). On November 9, 2009, the district attorney filed an amended information adding the allegation, in counts 1 and 2, of a 1996 attempted second degree robbery prior as a serious-felony prior (§§ 211, 212.5, subd. (c), 667, subd. (a)).

On November 12, 2009, Rico admitted, while the jury was deliberating, a 1996 attempted second degree robbery prior, in counts 1 and 2, as both a strike prior (§§ 211, 212.5, subd. (c), 667, subs. (b)-(i), 1170.12, subs. (a)-(d)) and a serious-felony prior (§§ 211, 212.5, subd. (c), 667, subd. (a)) and a 2008 willful-infliction-of-corporal-injury-on-a-spouse prior, in count 2, as a domestic-violence prior (§§ 273.5, subs. (a), (e)(1)). Shortly afterward, the jury found him guilty in count 2, found the domestic-violence great-bodily-injury allegation true in count 2, and found him not guilty in counts 1 and 3.

On December 18, 2009, Rico requested the exercise of the court's discretion to strike his strike prior. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504 (*Romero*); § 1385, subd. (a).) Although the record shows no express ruling by the court, the rejection of his request is inferable from the court's subsequent doubling of his sentence pursuant to the three strikes law. On January 12, 2010, the court imposed an aggregate sentence of 12 years – eight years (double the four-year midterm) on the willful infliction of corporal injury (§§ 273.5, subs. (a), (e)(1)) and four years (the midterm) consecutively on the great-bodily-injury enhancement (§ 12022.7, subd. (e)) – and imposed and stayed a five-year term on the serious-felony-prior enhancement (§ 667, subd. (a)).

On January 13, 2010, Rico filed his notice of appeal. On August 10, 2010, he filed the appellant's opening brief. On September 20, 2010, the Attorney General filed the respondent's brief. On October 13, 2010, Rico filed the appellant's reply brief. On

March 21, 2011, we affirmed the judgment, vacated the sentence, and remanded for resentencing. (*People v. Rico* (F059362).)

On August 19, 2011, Rico requested the exercise of the court’s discretion to strike his strike prior. (See *Romero, supra*, 13 Cal.4th at p. 504; § 1385, subd. (a).) The court declined to do so and imposed an aggregate sentence of 12 years – four years (double the two-year mitigated term) on the willful infliction of corporal injury (§§ 273.5, subds. (a), (e)(1)), three years (the mitigated midterm) consecutively on the domestic-violence great-bodily-injury enhancement (§ 12022.7, subd. (e)), and five years consecutively on the serious-felony-prior enhancement (§ 667, subd. (a)).

DISCUSSION

Rico argues that by not striking his strike prior the court committed an abuse of discretion that constitutes constitutionally disproportionate punishment under both the federal and state constitutions. The Attorney General argues the contrary. We agree with the Attorney General.

Before striking a strike prior, the court has the duty to consider, in light of the defendant’s new felony, strike priors, background, character, and prospects, if he or she is outside the spirit of the three strikes law, in whole or in part, so as to justify sentencing as if he or she had fewer strike priors or no strike priors at all. (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*)).) On appellate review of a court’s decision not to strike a strike prior, the “deferential abuse of discretion standard” applies. (*Id.* at p. 371.) Two fundamental precepts govern appellate review. (*Id.* at p. 376.)

First, the party attacking the sentence has the burden to show clearly that the decision was irrational or arbitrary. (*Carmony, supra*, 33 Cal.4th at p. 376.) In the absence of that showing, the appellate court presumes the court below acted to achieve legitimate sentencing objectives and will not set aside its decision on appeal. (*Id.* at pp. 376-377.) Second, the appellate court has no right to substitute its judgment for that of the court below, so the judgment cannot be reversed merely because reasonable people

might disagree. (*Id.* at p. 377.) Taken together, the two precepts establish that a court commits no abuse of discretion “unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Ibid.*)

Before the original sentencing hearing, Rico’s attorney filed a motion asking the court to consider striking the strike prior. He emphasized that, after Rico’s release on parole in 2000 for the attempted second degree robbery prior, he “became a certified electrician earning over \$32.00 per hour.” At the hearing, he acknowledged that Rico “has had some issues. He has a strike from 1996, 13 years ago, now 14 years ago, and he does have two prior spousal abuse convictions against the same victim, as well as four pending cases for violating a restraining order.” Even so, he “has gone a long ways towards reforming his life since the 1996 incident,” his attorney argued, especially with reference to his “substantial alcohol and drug problem.” His attorney characterized him as “a person who grabbed his wife by the arms, causing her bruising on the arms,” and as “a good candidate for probation.”

At the resentencing hearing, Rico’s new attorney asked the court to consider the arguments that his former attorney had made at his original sentencing hearing. After the court granted her request, she submitted the matter. Before the hearing, the court had read the probation officer’s report. At the hearing, the court read a letter Rico had written to the court. After stating that the “facts and circumstances of the current offense” indicate a “greater of [*sic*] danger to society,” that there were “significant injuries to the victim,” and that, “even though the old strike was older, he did have a string of convictions on a relatively consistent basis,” the court declined to strike Rico’s strike prior.

On appeal, Rico acknowledges the observation in the probation officer’s report that after he committed the attempted second degree robbery prior in 1996, for which he was released on parole in 2000, he committed two willful inflictions of corporal injury, one in 2000, the other in 2004. (§ 273.5, subd. (a).) He emphasizes that he was “highly

intoxicated” at the time of his commission of the crime and that there is no indication he “attempted to evade or resist the arresting officers.” He insists that the court “failed to properly consider all aspects of the current offense,” that the court “considered few if any actual background, character, and prospects facts” about him, and that if those facts were taken into consideration “the evidence was balanced in favor of striking the prior strike.” He argues that the court improperly characterized his attempted second degree robbery prior as a “serious and violent offense – and/or violent offense.” A “grant of leniency,” he claims, would not only “benefit both [him] and society” but also avoid “an unjust sentence.”

Rico’s argument conflates striking a strike prior with declining to do so. The law requires a court to state reasons for the former but not for the latter. (*People v. Zichwic* (2001) 94 Cal.App.4th 944, 960, citing *Williams, supra*, 17 Cal.4th at p. 159; *Romero, supra*, 13 Cal.4th at pp. 530-531; *People v. Mack* (1986) 178 Cal.App.3d 1026, 1032-1033.) A court is presumed to have considered all relevant factors in the absence of an affirmative record to the contrary. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) So a court’s comment on one factor does not imply the court’s lack of consideration of other factors. (*Ibid.*) Our reading of the record shows that the court simply misspoke by characterizing Rico’s attempted second degree robbery prior as a “serious *and* violent offense” and immediately corrected itself by characterizing his prior as a serious “*and/or* violent offense.” (Italics added; see § 1192.7, subs. (c)(19), (c)(39).) Even if we were to indulge Rico’s alternate reading of the record, a result more favorable to him was not reasonably probable. (See *People v. Skenandore* (1982) 137 Cal.App.3d 922, 925, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The record shows that Rico – a serial domestic violence offender with an escalating level of violence – held his wife on the bed and repeatedly hit her with his hands, that she struggled to kick him away and duck his swings, and that he hit her with an iron, lacerating her forehead. On that record, he fails to persuade us that the court’s

ruling declining to strike his strike prior was so “irrational or arbitrary that no reasonable person could agree with it.” (*Carmony, supra*, 33 Cal.4th at p. 377.)

So we turn to Rico’s argument that by not striking his strike prior the court inflicted constitutionally disproportionate punishment under both the federal and state constitutions. No procedural principle is more familiar to the United States Supreme Court than that the failure to assert a federal constitutional right at trial can forfeit the right of appeal. (*United States v. Olano* (1993) 507 U.S. 725, 731; cf. *United States v. Young* (1985) 470 U.S. 1, 15-16.) Although Rico had the duty to raise his fact-specific constitutional argument at sentencing, he did not do so. (See *People v. Norman* (2003) 109 Cal.App.4th 221, 229; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) Quite to the contrary, his attorney characterized an aggregate sentence of 12 years as an “appropriate” alternative to the aggregate sentence of 18 years the probation officer recommended.

Even if Rico had not forfeited his constitutional challenge, he could not have prevailed. Only a sentence that is so “disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity” is constitutionally excessive. (*In re Nuñez* (2009) 173 Cal.App.4th 709, 724-725 (*Nuñez*), quoting *In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*).) To secure relief, Rico must demonstrate that his punishment is disproportional in light of (1) the nature of the offense and his background, (2) the punishment for more serious offenses, or (3) the punishment for similar offenses in other jurisdictions. (*Nuñez, supra*, at p. 725, citing *Lynch, supra*, at pp. 425, 431, 436.) By briefing not one of those factors, he fails to overcome his considerable burden of showing the constitutional disproportionality of his sentence to his level of culpability. (See *Nuñez, supra*, at p. 725.) “Findings of disproportionality have occurred with exquisite rarity in the case law.” (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.) Rico’s disproportionality claim is meritless.

DISPOSITION

The judgment is affirmed.