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

THE PEOPLE,

Plaintiff and Respondent,

v.

DAMIEN LEE DAVIS,

Defendant and Appellant.

F068282

(Super. Ct. No. VCF235804)

**OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Darryl B. Ferguson, Judge.

Scott Concklin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, 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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Damien Lee Davis was convicted of one count of assault with a deadly weapon and sentenced to 33 years to life pursuant to the Three Strikes law. Davis was eligible for

a Three Strikes sentence because of four prior convictions for assault with a firearm, each of which qualified as a strike.<sup>1</sup>

In this appeal he first argues that his attorney rendered ineffective assistance of counsel in making an untimely and perfunctory motion, pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, to dismiss three of these strikes. More specifically, Davis contends counsel made the motion to dismiss his strikes too late for it to affect his sentence, as counsel did so two weeks *after* the court had imposed the sentence; he further contends counsel did not properly argue the motion as he informed the court at the outset he was merely making a record (counsel had similarly advised the prosecutor, who waived his presence at the hearing).

Davis's second argument is that, because all of his prior strikes arose from a single act, i.e., the firing of a single blast from a shotgun, all but one must be dismissed under the holding of *People v. Vargas* (2014) 59 Cal.4th 635 (*Vargas*), a case decided by the California Supreme Court during the pendency of the present appeal. He contends remand is required for the trial court to reconsider, in light of *Vargas*, the motion to dismiss his strikes. We disagree with Davis's contentions and affirm the judgment.

### **FACTS AND PROCEDURAL HISTORY**

Davis was convicted of stabbing Jose Christopher Lopez on the afternoon of April 20, 2010, during a brief fight at an apartment complex in Exeter. Lopez had come to the apartment complex to pick up his girlfriend, Michelle Avery, and their two children, to take them home to Bakersfield. Avery's mother lived at the complex, and Avery and the children had moved in with her about a week before, after Avery and Lopez had argued. Davis was the boyfriend of Avery's sister, Carmen Nicole Swayne, and lived with her in a different apartment within the same complex. Lopez and Davis

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<sup>1</sup>We use the term "strike" to refer to a prior felony conviction that triggers the application of the Three Strikes law. (§§ 667, subds. (b)-(i); 1170.12.)

were casual acquaintances. Lopez had heard that Davis wanted to beat him up because Lopez had argued with Avery.

Lopez testified he encountered Davis shortly after arriving at the apartment complex. They walked up to each other and began to fight. Davis stabbed Lopez twice with a black folding knife, which was about three inches long and one inch wide. As Avery intervened and pushed Davis away from Lopez, Davis commented, “I bet you won’t hit her again.” The fight lasted only two or three seconds. Afterward, Lopez went by ambulance to a hospital in Visalia. He was admitted for two days, and his wounds were drained and stitched up.

Based on this incident, a jury convicted Davis of one count of assault with a deadly weapon. (Pen. Code,<sup>2</sup> § 245, subd. (a)(1).) The jury also found true the allegations that Davis personally used a deadly weapon (§ 12022, subd. (b)(1)) and personally inflicted great bodily injury (§ 12022.7, subd. (a)) in committing the offense. In a bifurcated proceeding, the court found true the allegation that Davis had served a prior prison term (§ 667.5, subd. (b)), as well as the allegation he had suffered six prior felony convictions for assault with a firearm (§ 245, subd. (a)(2)), each of which qualified as a strike under section 1170.12 and as a prior serious felony conviction under section 667, subdivision (a). At sentencing, Davis moved for dismissal of all but one of his prior strikes pursuant to *Romero, supra*, but the trial court denied the motion. The court sentenced Davis to 47 years to life in prison.

Davis appealed and a panel of this court reversed the true findings on two of the six strike allegations. The court further held the trial court misapplied prior-serious-felony enhancements pursuant to section 667, subdivision (a), and erroneously sentenced Davis pursuant to section 1170.12, subdivision (c)(2)(iii) (option (iii)) instead of

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<sup>2</sup>Subsequent statutory references are to the Penal Code unless otherwise noted.

section 1170.12, subdivision (c)(2)(ii) (option (ii)). The court vacated the sentence and remanded the matter for resentencing.

On remand, the trial court found that Davis's instant conviction for assault with a deadly weapon under section 245, subdivision (a)(1), was a serious and violent felony<sup>3</sup> and a third strike meriting a sentence of 25 years to life in prison pursuant to option (ii). To this sentence, the court added five years based on the allegation that Davis had a previous conviction for a serious felony (§ 667, subd. (a)) and another three years based on the allegation that Davis had personally inflicted great bodily injury (§ 12022.7). The court sentenced Davis to a total term of 33 years to life in prison. Davis now appeals for the second time.

## **DISCUSSION**

### ***I. Davis's counsel was not ineffective***

At the resentencing hearing, defense counsel did not renew the *Romero* motion he had made at the initial sentencing hearing. After the court imposed the new sentence, defense counsel calendared a hearing to make a *Romero* motion but did not file a written motion. The prosecutor did not attend the motion hearing. Counsel informed the court the prosecutor had waived his appearance because counsel had calendared the *Romero* motion only for purposes of making a record. The court denied the *Romero* motion, further commenting, "Your record is made."

Davis now argues that counsel was ineffective in making a "belated oral *Romero* motion ... after sentence had been pronounced, which the court had no jurisdiction to grant in the absence of the prosecutor ...." He contends counsel's "perfunctory attempt to preserve the record" denied him "the opportunity to have his *Romero* motion heard in a meaningful manner." The People respond that Davis has failed to show both that

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<sup>3</sup>Pursuant to section 1170.12, subdivision (b), "serious" felonies are defined in section 1192.7, subdivision (c), and "violent" felonies are defined in section 667.5, subdivision (c).

counsel's performance was deficient, as well as any prejudice on account of counsel's actions. We agree with the People that the record does not support Davis's claim that counsel was ineffective.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance "fell below an objective standard of reasonableness," and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694; see also *People v. Hester* (2000) 22 Cal.4th 290, 296.)

Here, counsel moved, at Davis's initial sentencing on March 13, 2012, to dismiss all but one of his prior strikes in the interests of justice pursuant to section 1385. Counsel argued that doing so was necessary in order to fashion a sentence that was proportionate to Mr. Davis's offenses. Davis had four prior strikes for assault with a firearm, all of which arose from an incident in which Davis fired one shot from a shotgun.<sup>4</sup> In support of the *Romero* motion, counsel argued as follows:

"The prior case from, I believe it was 1999, it basically involved him being attacked by a gang member, him defending himself and firing a gun at the person who initiated the fight back then. Because he fired a gun in self-defense, which the jury rejected at that time but we [contend] was the case, and there were people that were in the vicinity. They filed, basically, four strikes against him. We believe that basically based upon the facts of that case, it should be considered as only one prior strike.

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<sup>4</sup>There was some confusion as to whether Davis had four prior strikes or six prior strikes. All of his prior strikes were from a single case, and the abstract of judgment issued in that case erroneously stated he had six prior convictions for assault with a firearm when in actuality, as determined by this court on appeal, he had four prior convictions for assault with a firearm. Defense counsel explained to the trial court in the course of arguing his *Romero* motion that Davis had four prior strikes, not six, and the prosecutor, for his part, also argued that Davis had four prior convictions for assault with a firearm. The court's resolution of the *Romero* motion did not hinge on the difference between four and six prior strikes.

“In the present case, Mr. Davis was found guilty of assaulting a man who had been basically committing domestic violence upon the person of his [fiancée’s] sister [and] was found guilty of causing GBI, which was a laceration to the individual’s chest using some sort of sharp instrument. [¶] ... [¶]

“We believe that based upon the case law of Lynch and Romero, taking all of this into consideration, that it would be appropriate for the Court to at least consider striking three of the prior strikes, impose doubl[e] the term, which he would still get a substantial term, he still would be looking at five years doubled, which would be ten, plus the GBI, plus the knife, which would be additional four, plus Nickel prior, which would still be 19 years in prison. That would be an extremely long time. He would do that at 85 percent because of the nature of this offense. So we would ask the Court to use its discretion and in the interest of justice impose a sentence that would be proportional to this crime.”

The prosecutor argued that Davis deserved a Three Strikes sentence because he was a violent and dangerous individual as evidenced by the fact he had recently completed a sentence of 10 years 4 months for assaulting four people with a firearm, and, before too long, had stabbed an unarmed person who posed no threat to him.

The judge ruled as follows:

“In this Court’s opinion, Mr. Davis is the reason the People of the State of California passed the three strikes. He assaulted four, more than four individuals on a previous date, was convicted by jury trial, with a firearm. There may have been extenuating circumstances, but the jurors didn’t buy it.

“In this case, shortly after being released from prison after a ten-year term, he committed another assault with a knife upon a victim who was unarmed. And based upon that, the Court is going to exercise its Romero [discretion] and not strike a strike or any of the strikes.”

In light of the court’s remarks at the first sentencing hearing, we cannot say counsel was professionally unreasonable in deciding not to renew the motion at the second. It might be thought that counsel himself believed he had made a mistake, and that is why he raised the matter belatedly. Yet the record does not compel this conclusion. Counsel might have reasoned that, although there was no realistic chance of

changing the trial court's mind, a record should be made to preserve the issue in case a later change in the law should make it germane on appeal. (In fact, a new development in the case law did give rise to a colorable appellate issue, the *Vargas* issue discussed below.) This would be consistent with a reasonable calculation that the trial court's view of the matter had already been expressed strongly and clearly and was unlikely to change.

Similarly, we cannot say it is reasonably probable that Davis would have obtained a better result if his counsel had raised the *Romero* issue at the second sentencing hearing. The court's position had been made clear. Counsel had nothing new to say. When he did present the issue postsentencing, he made the same substantive argument as before. Davis argues that, the second time around, counsel more clearly articulated the fact that the four prior strikes all arose from a single act, i.e., the firing of one shot from a shotgun. However, the record indicates counsel adequately argued that point at the initial sentencing, and it was not disputed by the prosecutor. Indeed, counsel told the trial court at the second motion hearing he was basically renewing the arguments he had made at the initial sentencing hearing. The court noted it had "exercised its *Romero* prerogative at the time of sentencing" and determined the circumstances warranted a third-strike sentence.

In sum, the record does not support Davis's claim of ineffective assistance of counsel. Davis has failed to show both that counsel's performance was deficient and that he was prejudiced by counsel's conduct.

## ***II. Vargas does not provide a basis for relief from Davis's sentence***

Davis argues that *Vargas, supra*, 59 Cal.4th 635, which was issued during the pendency of this appeal on July 10, 2014, applies to his case. *Vargas* held that "two prior convictions arising out of a single act against a single victim" cannot "constitute two strikes under the Three Strikes law." (*Id.* at p. 637). Davis contends that, because all of his prior convictions arose from a single act, i.e., one shot fired from a shotgun, under *Vargas*, they cannot constitute multiple strikes within the meaning of the Three Strikes

law. He asserts the case must be remanded to give the trial court the opportunity to reconsider, in light of *Vargas*, his motion to dismiss some of his prior strikes. The People respond that the rule announced in *Vargas* simply does not apply to the facts of Davis's prior strike offenses, and, therefore, remand is not justified. We agree that *Vargas* does not apply and remand is not warranted.

In *Vargas*, the defendant was convicted of both robbery and carjacking for “forcibly taking the victim’s car.” (*Vargas, supra*, 59 Cal.4th at p. 645.) *Vargas* noted the defendant’s “two prior felony convictions—one for robbery and one for carjacking—were not only tried in the same proceeding and committed during the same course of criminal conduct, they were based on the same act, committed at the same time, against the same victim.”<sup>5</sup> (*Id.* at p. 638.) *Vargas* reasoned that, “where, as here, an offender committed but a single act, we disagree she poses a greater risk to society merely because the Legislature has chosen to criminalize the act in different ways. The Legislature is free to criminalize an act in multiple ways, but that it has done so does not of itself make an offender more blameworthy, or more dangerous, within the meaning of the Three Strikes law.” (*Id.* at pp. 646-647, fn. omitted.) *Vargas* concluded that, in light of all these considerations, the case was “one of the extraordinary cases [citation] in which the nature and circumstances of defendant’s prior strike convictions demonstrate the trial court was required to dismiss one of them because failure to do so would be inconsistent with the spirit of the Three Strikes law.” (*Id.* at p. 649.)

The facts of Davis’s prior convictions are distinct from the scenario considered in *Vargas* because each one of his convictions is related to a different victim. In contrast to the *Vargas* defendant, whose single act resulted in multiple strikes because the Legislature chose to criminalize it in different ways, Davis received multiple strike

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<sup>5</sup>The court defined the underlying single act as “forcibly taking the victim’s car.” (*Vargas, supra*, 59 Cal.4th at p. 645.)

treatment on the basis of a single act because the act in question endangered multiple people. In light of established sentencing principles discussed in more detail below, we find this distinction pivotal. Accordingly, we reject Davis’s contention that *Vargas*’s holding applies to his case.

In California, sentencing determinations have long reflected the “distinction between an act of violence against the person that violates more than one statute and such an act that harms more than one person,” with harsher punishments applied to acts that harm or have the potential to harm more than one person. (*Neal v. State of California* (1960) 55 Cal.2d 11, 20-21; see also *People v. Oates* (2004) 32 Cal.4th 1048, 1063.) It is because of this distinction, for example, that our Supreme Court carved out a “multiple victim” exception to section 654’s prohibition against multiple punishment for a single “act or omission that is punishable in different ways by different provisions of law ....” The Court determined that section 654 does not apply where “‘one act has two results each of which is an act of violence against the person of a separate individual.’ [Citations.]” (*Neal, supra*, at pp. 20-21.) The court explained its rationale as follows: “A defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person. For example, a defendant who chooses a means of murder that places a planeload of passengers in danger, or results in injury to many persons, is properly subject to greater punishment than a defendant who chooses a means that harms only a single person.” (*Id.* at p. 20.) The court suggested that a “multiple victim” exception is consistent with section 654’s overarching purpose to ensure that “the defendant’s punishment will be commensurate with his criminal liability.” (*Neal, supra*, at p. 20.)

In light of these longstanding sentencing principles, we agree with the Fourth District Court of Appeal that “[t]he absence of any discussion in *Vargas* of multiple

victims of violence is more than an abstract or esoteric distinction” of that opinion.<sup>6</sup> (*People v. Rusconi* (2015) 236 Cal.App.4th 273, 280.) In *Rusconi*, the defendant was sentenced to 25 years to life pursuant to the Three Strikes law for felony driving under the influence, as she had suffered two prior manslaughter convictions that qualified as strikes. On appeal from her petition for recall of her sentence under the Three Strikes Reform Act, she argued she was entitled to relief under *Vargas, supra*, 59 Cal.4th 635, since her prior two strikes arose from the single act of driving under the influence of alcohol. In the prior incident, while driving under the influence of alcohol, the defendant drove her car onto the shoulder of a narrow road, hitting two cyclists, both of whom died. The Court of Appeal concluded the holding in *Vargas* did not extend to offenders such as *Rusconi* who had suffered multiple convictions growing out of a single act but who violently injured more than one victim. (*Rusconi, supra*, at p. 281.)

The weight of our jurisprudence and *Rusconi* indicate that the holding of *Vargas* does not extend to offenders such as *Davis*, whose prior strikes were based on a single act of violence that put more than one person in harm’s way. Given our conclusion that *Vargas* does not apply to this case, we need not remand the matter for the trial court to reconsider, in light of *Vargas*, *Davis*’s motion to dismiss his strikes.

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<sup>6</sup>We recognize, of course, that *Vargas* did not need or purport to address a factual scenario where a single act led to multiple violent offenses against multiple victims and is not precedent for this factual presentation. (See *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2 [appellate decision reflects facts and issues considered by court and “is not authority for a proposition not therein considered”].)

**DISPOSITION**

The judgment is affirmed.

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Smith, J.

WE CONCUR:

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Franson, Acting P.J.

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Peña, J.