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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR GEORGE GILLESPIE,

Defendant and Appellant.

G046143

(Super. Ct. No. 10HF0454)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed as modified.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lynne G. McGinnis and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Victor George Gillespie of sexual battery by restraint (count 2; Pen. Code § 243.4, subd. (a)),¹ first degree burglary (count 3; §§ 459, 460, subd. (a)), and misdemeanor resisting arrest (count 4; § 148, subd. (a)(1)). Upon the People’s motion, the court dismissed allegations defendant had two serious felony prior convictions under section 667, subdivision (a)(1). Defendant then admitted he had suffered two prior strikes under the “Three Strikes” law. (§§ 667, subds. (d), (e)(2)(A), 1170.12, subds. (b), (c)(2)(A).) The court sentenced defendant to 25 years to life in prison on count 2.²

On appeal defendant asserts the court erred by declining to strike his prior strikes and by miscalculating his presentence conduct credits. We agree the trial court miscalculated his conduct credits. In all other respects, we affirm the judgment.

FACTS

On the night of March 23, 2010, 24-year-old H.S. took her dog for a quick walk near her apartment. An African-American man walked very close to H.S. and said, “Hi.” He walked “too close” to H.S., which made her feel uncomfortable. She did not recognize him, although she knew most of her neighbors.

H.S. returned to her apartment, locked the front door, closed the blinds, and went into her bedroom. About five to 10 minutes later, her dog’s ears went up and he ran

¹ All statutory references are to the Penal Code.

The jury was unable to reach a verdict on count 1, assault with intent to commit a sexual assault during a burglary. (§ 220, subd. (b).) The court dismissed count 1 at the People’s request.

² On count 3, the court imposed and stayed execution (pursuant to § 654) of a concurrent 25-years-to-life term. On count 4, the court suspended sentence.

out “really” fast. H.S. thought the dog had heard a common noise like neighbors talking outside.

About five minutes later, H.S. felt tired, lay down on her bed, called for her dog, and closed her eyes. She heard running footsteps and felt someone jump on top of her and grab her hip. She looked at the person’s face and did not recognize him. H.S. did not smell any alcohol on him. At trial, she identified defendant as the man who jumped on her.

Defendant said, “Hey baby.” He put his hand down her pants and grabbed her vagina really hard under her panties. H.S. grabbed his hand out, and started punching, kicking, and screaming. After she fought with defendant for about seven to eight seconds, he jumped off her and ran out the open, back sliding door. (H.S. was sure the door had been closed when she returned from her walk.)

H.S., wanting to get out of the house, opened the front door just in time to see defendant run past. H.S. yelled, “Get the f out of here.” H.S. phoned 911, described her attacker, and said he was running toward Culver Drive.

Two officers responding to the area chased defendant, who refused to stop despite the officers’ demands he do so. One officer caught up with defendant, drew his taser, and ordered him to the ground. Defendant put his hands up and went down on his knees. An officer handcuffed him. The officer did not notice any odor of alcohol or slurred speech.

In a police interview, defendant eventually admitted he had seen a woman walking a dog and wanted “to mack with her,” meaning he wanted to converse with her. He said there was an apartment with an open fence and open sliding door with South Park on the television in the living room. Eventually, he admitted going into a room where a woman was lying on her bed and said he fell on top of her. Defendant claimed he was so intoxicated that he was staggering. He admitted putting his hand down her pants and touching her skin.

Another woman testified that on numerous occasions in early 2010, defendant came too close to her when she was walking her dog, or watched her as she came and went, which made her feel uncomfortable and afraid.

Defense Case

Defendant testified on his own behalf. He claimed he was under the influence of Xanax, Ecstasy, and marijuana laced with PCP and mistakenly entered the wrong apartment when he was trying to meet some friends at a party. He watched South Park on the television for a short while. He then walked down the hallway and into a bedroom. He tripped over an untied shoelace and fell onto a woman's bed. The woman started screaming at him. He pushed himself off her, using his hand on the area between her vagina and her stomach (above her clothes), and ran out of her room. He denied ever trying to sexually assault her or that he intended to do such acts when he entered the home.

DISCUSSION

The Court Did Not Abuse Its Discretion by Denying Defendant's Invitation to Dismiss a Prior Strike

The probation report revealed that when defendant was 12 years old, he grabbed a woman's bottom when she was riding a bike. When he was 13 years old, he peeped in someone's window and resisted arrest. When he was 14 years old, he violated probation by not reporting to his probation officer, missing school, and failing to complete his community service. In 2007, when he was 17 years old, he suffered his two strikes, both of which were sustained juvenile petitions for robbery under section 211. (§§ 667, subds. (d), (e)(2)(A), 1170.12, subds. (b), (c)(2)(A), 667.5, subd. (c)(9) [robbery is serious felony], 1192.7, subd. (c)(19) [robbery is violent felony].) As to the first strike,

defendant and a companion tried to steal alcohol from a grocery store and when confronted, they assaulted a store employee and the store manager. Defendant pushed the manager, saying, "Get the fuck out of my way." The second strike occurred three and a half months later, when defendant distracted a victim by asking her for the time and then grabbed her wallet and ran.

Prior to the sentencing hearing, defendant invited the court to exercise its section 1385 discretion to dismiss one or both of the juvenile adjudications. He argued that he was under the influence of drugs and alcohol on the date he committed the current offenses and had abused drugs and alcohol since he was 16 years old. He asserted he (1) had been attending counseling sessions and working toward obtaining his high school diploma while in custody, (2) had expressed remorse to the victim, (3) had his family's support and was gainfully employed during his "brief adult life," and (4) was highly motivated and had no gang affiliation. He further argued that his juvenile adjudications occurred only months apart and differed in substance from his current convictions. Defendant concluded these factors combined to place him outside the spirit of the Three Strikes law for sentencing purposes.

On appeal defendant contends the trial court abused its discretion by denying his invitation under section 1385 to dismiss one or more of his prior strike adjudications. He argues he "quickly fled the apartment when [H.S] yelled at him and told him to leave, so these offenses were less serious than likely would have been committed by a violent repeat offender, and did not justify the imposition of a 25 year to life sentence under the three strikes laws, which the trial court recognized would likely result in [defendant] never being released from prison." He asserts he would have good prospects upon his release from custody, noting the factors stated in his probation report that (1) his uncle has offered to give him a job in the future, and (2) prior to his arrest, defendant had planned to join the Marine Corps after he completed high school. He notes that, absent the two prior strikes, his sentence would have been at most a six-year prison

term. (§ 461, subd. (a) [six-year maximum sentence for burglary].) He argues that his two prior robbery adjudications did not warrant increasing a maximum six-year term to 25 years to life, emphasizing that the first robbery began as a shoplifting incident and the second robbery involved his purse snatching after distracting the victim. He concludes the court should have dismissed one strike and imposed a sentence of between four to 12 years in prison.

Section 1385, subdivision (a), authorizes a court, on its own motion or a prosecutor's application, to "order an action to be dismissed" in furtherance of justice. In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 508 (*Romero*), our Supreme Court "held that the Three Strikes law did not remove or limit this section 1385 power to strike sentencing allegations." (*People v. Garcia* (1999) 20 Cal.4th 490, 496 (*Garcia*)). "[A] defendant may invite the court to exercise its power . . . , and the court must consider evidence offered by the defendant in support of his assertion that the dismissal would be in furtherance of justice." (*Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 441-442.)

Our Supreme Court has set forth guidelines on "how trial and appellate courts should undertake to rule and review in this area." (*People v. Williams* (1998) 17 Cal.4th 148, 152 (*Williams*)). When ruling on a section 1385 motion in the context of a Three Strikes case, a trial court must consider the defendant's constitutional rights and "the interests of society represented by the People." (*Romero, supra*, 13 Cal.4th at p. 530.) The court should take into account "individualized considerations" (*id.* at p. 531), such as "the nature and circumstances of the defendant's present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects" (*Williams*, at p. 161). The ultimate question is whether "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.” (*Ibid.*) “[T]he underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences.” (*Garcia, supra*, 20 Cal.4th at p. 500.)

“The purpose of [the Three Strikes law] is to deter and punish recidivism by making repeat offenders serve longer sentences.” (*Williams, supra*, 49 Cal.App.4th at p. 1638.) Because the Three Strikes law “creates a strong presumption that any sentence that conforms to [its] sentencing norms is both rational and proper,” a trial court’s decision not to strike a prior conviction will generally be upheld. (*People v. Carmony* (2004) 33 Cal.4th 367, 378.)

A trial court’s section 1385 ruling is “subject to review under the deferential abuse of discretion standard.” (*People v. Carmony, supra*, 33 Cal.4th. at p. 374.) This is true whether the trial court dismisses, or declines to dismiss, a prior felony conviction allegation. (*Ibid.*) “In reviewing for abuse of discretion, [an appellate court must] be guided by two fundamental precepts.” (*Id.* at p. 376.) “First, “[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary.”” (*Ibid.*) “Second, a “decision will not be reversed merely because reasonable people might disagree.”” (*Id.* at p. 377.) Abuse of discretion for failure to strike occurs only in “limited circumstances,” such as where the trial court was unaware of its discretion or “considered impermissible factors” or in an “extraordinary case — where the relevant factors described in *Williams* . . . manifestly support the striking of a prior conviction and no reasonable minds could differ” (*Id.* at p. 378.)

Here, the court did not abuse its discretion by declining defendant’s invitation to dismiss a prior strike adjudication. The court reviewed the probation report, defendant’s statement in mitigation, and defendant’s section 1385 invitation. The court gave “very serious consideration” to defendant’s invitation. The possibility of a 21-year-old person serving a potentially full life sentence “weighed heavily” on the court, causing the court to weigh, consider, and reconsider the issues. The court considered defendant’s interests and those of society, and performed an individualized evaluation of the relevant

factors. The court stated, “[Defendant] is a young man who is 21 years old, and the imposition of all strikes with concurrent sentencing could result in a maximum prison sentence of 25 years to life. The court has considered many factors in determining if a Three Strikes sentence is appropriate in this case or striking one or more strikes pursuant to *Romero* and *Williams* would even be appropriate.” The court stated its findings. Defendant’s current offenses and two prior robbery adjudications all reached “a significant level of egregiousness.” The prior robberies occurred “just a few months apart from each other . . . when [defendant] was 17 years old, only a few years before the commission of the current crimes.” “His two current crimes are violent and more disturbing. They were predatory in the worst possible way. He believes that he’s entitled to commit these acts, and this creates a serious danger to the people who are entitled to a proper judgment, the result of which would be protection of society.” “The credible evidence submitted at the time of trial does not support” defendant’s assertion he acted under the influence of drugs and alcohol. At age 21, defendant has “a history of violence, theft and inappropriate sexual acts directed to women that had, for the most part, gone unchecked by the system, commencing at age 12 and continuing until he was 18, and then as an adult, and he conducts himself with impunity. In the current case, [defendant] lied continuously to the police, and tried to continue that course when he testified in court during trial.” Defendant’s “history of offending and re-offending” and his belief in entitlement “strongly suggests that if given the opportunity he will continue to re-offend.” The court concluded defendant came within the spirit of the Three Strikes law.

The court thoroughly considered the relevant factors and circumstances. Defendant fails to show the court’s ruling was irrational or arbitrary.

Defendant is Entitled to Additional Presentence Conduct Credit

Defendant contends the court erred by limiting his presentence conduct credit pursuant to section 2933.1, based on the circumstance that he burglarized a home

occupied by a person other than an accomplice, even though that fact was not charged or proven as required by section 667.5, subdivision (c)(21).

Section 2933.1, subdivision (a) limits a person convicted of a violent felony listed in section 667.5, subdivision (c), to 15 percent of presentence work time credit. Section 2933.1, subdivision (c) limits such a person's conduct credit to 15 percent of the actual period of confinement. Under section 667.5, subdivision (c)(21), first degree burglary constitutes a violent felony, if "it is *charged and proved* that another person, other than an accomplice, was present in the residence during the commission of the burglary." (Italics added.)

Here, the burglary count in the information charged defendant with "unlawfully enter[ing] an inhabited dwelling house . . . inhabited by JANE DOE, with the intent to commit a violation of the Penal Code section 261 (a)(2) [rape] and/or 289 (a)(1) [sexual penetration], a felony." Defendant argues the phrase "inhabited by Jane Doe" did not necessarily mean Jane Doe was present in the home, because a "house is consider[ed] to be inhabited if it is currently being used for dwelling purposes, *whether it is actually occupied at the time of the burglary or not.*" Defendant is correct. Section 459, which defines burglary, provides: "As used in this chapter, 'inhabited' means currently being used for dwelling purposes, whether occupied or not." Thus, the information did *not* charge defendant with burglary with a non-accomplice present at the time.

The court erred by ruling defendant was entitled to presentence conduct credit of only 15 percent of his actual time served. Section 2933.1, by its terms, applies to violent felonies listed in section 667.5, subdivision (c). None of the offenses of which defendant was convicted is listed in that subdivision. (See *People v. Thomas* (1999) 21 Cal.4th 1122, 1124-1130 [Three Strikes prisoner entitled to presentence conduct credits computed under § 4019 if current conviction is not for § 667.5 "violent" felony].) Under the plain wording of section 667.5, subdivision (c)(21), the presence of a non-accomplice during a burglary must be pleaded and proved in order for the burglary to constitute a

violent crime. (See *People v. Mancebo* (2002) 27 Cal.4th 735, 738-739, 744 [due to § 667.6’s “express pleading and proof requirements,” court erred by imposing One Strike sentencing based on multiple victim circumstance not alleged in the information; error was not harmless, even though information contained separate counts with separate victims].)

Because defendant was convicted of first degree burglary (a serious felony under § 1192.7, subd. (c)(18)) and the court required him to register as a sex offender, under the version of section 4019 in effect on the date he committed the offenses in this case, he is entitled to 819 days of presentence credit, consisting of 615 actually served days and 204 days of section 4019 conduct credits.³

DISPOSITION

The judgment is modified to grant defendant a total of 819 days of presentence credits, comprised of 615 days in actual custody and 204 days of conduct credit. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

IKOLA, J.

WE CONCUR:

O’LEARY, P. J.

MOORE, J.

³ Defendant’s briefs inaccurately state he served 618 days of actual presentence custody.