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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.

JASON RUSSELL DAVIS,

Defendant and Appellant.

G048841

(Super. Ct. No. 11NF1902)

O P I N I O N

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

Christopher Nalls, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Ryan H. Peeck, Deputy Attorneys General, for Plaintiff and Respondent.

Coming into this case appellant Jason Russell Davis already had three serious and/or violent felony convictions to his name. So after he was convicted of yet another felony in this proceeding, the trial court sentenced him to 25 years to life in prison in accordance with the Three Strikes law. The sole issue before us is whether the court erred in refusing to dismiss two of appellant's prior convictions and sentence him to a lesser term. Finding no abuse of discretion in that regard, we affirm the judgment.

FACTS

On the afternoon of June 7, 2011, Gabriela Romero drove to her bank in Yorba Linda to make a withdrawal. Her sister Claudia accompanied her on the trip, but she stayed in the car while Gabriela walked up to use the ATM. Gabriela was in the process of withdrawing \$400 or \$500 when appellant approached her from behind. Claiming the ATM he was trying to use was not working, he asked Gabriela if hers was. She said yes but asked appellant to step back so she could complete her transaction. Instead, appellant stepped closer and threatened to kill Gabriela if she did not give him the money that was just then coming out of her ATM.

A 17-year Army veteran, Gabriela wasn't about to roll over. Describing her reaction to appellant's threat, she testified, "I grabbed the money, he reached for it, and we started an altercation" During the fight, appellant got hold of the money. Gabriela tried to get it back, but appellant fought her off by hitting her about the head and face. At trial, she said, "I don't know what hand he hit me with. I just know that he hit me with some . . . kind of silver [metal] object." At one point, Claudia came to Gabriela's aid, and they were both fighting with appellant. Despite their best efforts, appellant was able to get away with the money.

The altercation left Gabriela and Claudia bleeding and disoriented. Claudia's wounds were largely superficial, but Gabriela needed stitches for two lacerations near her eye. She testified her wounds left scars and have also worsened a headache problem and hampered her vision.

Appellant was arrested about a week after the incident. While he was being taken into custody, he resisted arrest and had to be subdued with a taser. He was then taken to the police station for questioning. After waiving his *Miranda* rights, he denied any involvement in the robbery. However, as questioning wore on, he admitted he tried to take Gabriela's money in order to support his drug habit. He also admitted he was holding his keys at the time and may have hit Gabriela with them while they were struggling.

Appellant was charged with first degree robbery, two counts of aggravated assault (one each as to Gabriela and Claudia) and resisting arrest. (Pen. Code, §§ 211/212.5, subd. (b); 245, subd. (a)(1); 148, subd. (a)(1).)¹ The jury convicted appellant as charged on the robbery and resisting counts. It acquitted him of aggravated assault but found him guilty of the lesser included offense of simple assault. (§ 240.) And it found the allegation he personally inflicted great bodily injury on Gabriela not true. (§ 12022.7, subd. (a).)

In a bifurcated proceeding, appellant admitted he had previously been convicted of three prior "strike" offenses. In particular, he admitted he suffered two convictions for attempted murder and one conviction for first degree burglary arising from a single case in 1998. (§§ 667, subds. (d), (e)(2)(A); 1170.12, subd. (b), (c)(2)(A).) As to that same case, appellant also admitted having suffered a prior serious felony conviction and having served a prior prison term for purposes of section 667, subdivision (a)(1) and section 667.5, subdivision (b).

Although appellant waived his right to a presentencing probation report, both parties submitted briefs to assist the court in making its sentencing decision. The prosecutor argued appellant should be sentenced to life in prison under the Three Strikes law because both his current robbery and his three prior strikes involved acts of violence.

¹ All further statutory references are to the Penal Code.

Describing the offenses giving rise to appellant's strikes, the prosecutor explained appellant and his codefendant entered a residence in which a man and woman were sleeping. After the codefendant shot and stabbed the man, appellant held the man down with a rope, and the codefendant proceeded to stab the woman. Then appellant and the codefendant fled to Mexico. Following his apprehension, appellant pled guilty to residential burglary and two counts of attempted murder and was sentenced to 12 years in prison.

In her sentencing brief, defense counsel argued appellant deserved leniency because he grew up in an abusive environment and was only seeking drug money, not trying to hurt anyone, when he committed the instant offenses. Besides submitting several letters of recommendation on appellant's behalf, defense counsel supplied parole records indicating appellant was only "indirectly involved" in the attack on the two victims in his prior case. Apparently, the codefendant was upset with the male victim over a drug deal in that case, and neither victim implicated appellant in any of the violence that occurred. Defense counsel also emphasized the fact appellant was released from parole early and had managed a clean record for about five years before reoffending in the instant case. Defense counsel felt that, under these circumstances, the trial court should dismiss two or more of appellant's prior strikes, so he would not have to serve an indeterminate life sentence.

In considering that request, the court recognized appellant's three prior strikes all "came out of one incident." However, the court believed the strikes all "reach[ed] a very significant level of egregiousness." The court also felt appellant's current robbery offense was very serious in that he threatened to kill Gabriela and punched her in the head with his keys. Even though the jury found the great bodily injury allegation not true, the court found it significant that appellant "beat and injured both of the victims." Given appellant's history of "exceptionally dangerous" conduct, the court believed giving him leniency would only be "setting him up for failure [and] putting

society in danger.” Therefore, the court refused to dismiss any of his prior strikes and sentenced him to 25 years to life on the robbery count, plus 5 years for the prior serious felony conviction. The court stayed sentencing on the remaining counts and the prison prior.

DISCUSSION

Appellant contends the trial court abused its discretion in refusing to dismiss at least two of his prior strikes and sentence him as a second-strike offender to a determinate prison term. We cannot agree.

Trial courts may dismiss a defendant’s prior strike convictions, but only if doing so would further the ends of justice. (§ 1385, subd. (a); *People v. Superior Court (Romero)* 13 Cal.4th 497, 507-508.) In deciding whether to exercise this power, a court must consider the constitutional rights of the defendant and the societal interest in ensuring the fair prosecution of criminal cases. (*Id.* at p. 530.) Ultimately, the court must determine “whether, in light of the nature and circumstances of his present felonies and prior [convictions], and the particulars of his background, character, and prospects, the defendant may be deemed outside the [spirit of the Three Strikes law], in whole or in part, and hence should be treated as though he had not previously been convicted of one or more [strikes].” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

The trial court’s refusal to dismiss a prior strike conviction allegation is reviewed under the deferential abuse-of-discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) Under that standard, the defendant must show the court’s decision was irrational or arbitrary, which is a difficult thing to do. (*Id.* at p. 376.) In fact, only in “an extraordinary case,” where the circumstances “manifestly support the [dismissing] of a prior [strike] conviction and no reasonable minds could differ” would the failure to dismiss constitute an abuse of discretion. (*Id.* at p. 378.)

People v. Vargas (2014) 59 Cal.4th 635 is a recent example of such an extraordinary case. There, our Supreme Court ruled that when the defendant’s prior

strike convictions “were based on the same act, committed at the same time, and against the same victim,” it would be an abuse of discretion to treat the priors as separate strikes for purposes of the Three Strikes law. (*Id.* at pp. 638-639.) Because the Three Strikes law was designed to give offenders “three chances – three swings of the bat, if you will – before the harshest penalty could be imposed,” *Vargas* determined it would be unfair for a person to be “called for two strikes on just one swing,” i.e., where his strikes “were based on a single criminal act.” (*Id.* at p. 646.)

In our case, however, appellant’s three prior strikes were not based on a single act against a single victim, but multiple acts against multiple victims. Even though appellant’s strikes arose out of the same incident and the same case, *Vargas* makes clear that they nevertheless may be treated as separate strikes for purposes of the Three Strikes law. (*People v. Vargas, supra*, 59 Cal.4th at p. 638, citing *People v. Fuhrman* (1997) 16 Cal.4th 930 [prior strikes arising from the same proceeding need not be treated as a single strike] and *People v. Benson* (1998) 18 Cal.4th 24 [prior strikes arising from the same course of conduct need not be treated as a single strike].)

Nonetheless, appellant argues the trial court erred in failing to dismiss at least two of his prior strikes because he was only 21 years old when they arose and he did not directly perpetrate the subject offenses, rather, he only aided and abetted their commission. However, the record indicates appellant physically restrained one of the victims while his codefendant stabbed the other victim. He was directly involved in the violence. It’s not like he was sitting outside in a getaway car or looting another room when his codefendant unexpectedly turned violent.

Moreover, in the current case, appellant threatened to kill Gabriela and punched her in the head with his keys. Although Gabriela was fortunate to avoid serious bodily injury, she required hospitalization and stitches and was clearly shaken up by the ordeal. Appellant also assaulted and injured Gabriela’s sister Claudia. The incident plainly shows that, despite serving considerable prison time for his prior strikes, appellant

has not been successfully rehabilitated. While he blames his current offense on his drug problem, the fact remains appellant has repeatedly demonstrated he is not afraid to engage in violent behavior to get what he wants, which makes him a serious danger to society. And, of course, the drug habit proves his five years of good behavior were free of convictions, but not free of crime.

For all these reasons, we believe the trial court acted well within its discretion in refusing to dismiss any of appellant's prior strike convictions. While appellant's sentence is certainly severe, we cannot say the trial court acted irrationally or arbitrarily in treating him as a third strike offender. We are therefore powerless to disturb appellant's sentence.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.