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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

BINH HOANG,

Defendant and Appellant.

H036502

(Santa Clara County

Super. Ct. No. CC807530)

Defendant Binh Hoang was convicted of assault with a deadly weapon (Pen. Code, § 245, subd. (a))¹ and other crimes and sentenced to prison for 15 years and four months. On appeal defendant maintains that the trial court abused its discretion when it refused to strike his prior strike conviction (§§ 667, subds. (a)-(i), 1170.12) as allowed by *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). We detect no abuse of discretion and affirm the judgment.

I. FACTS

A. The Prior Strike

Defendant and victim Kim Vo had known each other from the local community college. They were friends but there was never any romantic relationship between them. On July 3, 2003, defendant had driven Vo home from school. She declined to spend further time with him that day, saying she was going to her boyfriend's house. At around

¹ Hereafter all unspecified statutory references are to the Penal Code.

9:30 p.m. there was fire in a grassy area next to the boyfriend's house. Then at about 10:24 p.m. defendant came by and threw two Molotov cocktails over the fence into the backyard, burning some of the property. Two people were injured trying to put the fire out. Defendant was charged with arson (§ 451, subd. (b)). He became depressed and suicidal. On October 9, 2003, defendant was convicted of a single count of arson; imposition of sentence was suspended and he was granted probation on the condition he serve a year in county jail.

B. The Instant Offenses

Upon release from jail for the arson conviction defendant contacted Vo, delivered a basket of fruit to her home, and was apologetic. Vo believed that his attitude had improved and they became friends again. Sometime late in 2007, Vo introduced defendant to her new boyfriend, Keith Le. Shortly thereafter, in January 2008, Le and Vo were leaving a restaurant in Le's Lexus when Le discovered all four tires on the car were flat. Defendant pulled up in his car and offered Vo a ride home. The two men argued. Defendant somehow dragged Vo, who was drunk, to his car and he and Le commenced a fist fight. Le was hit in the eye. Defendant then pulled out a tire wrench and broke four of the windows on the Lexus. It cost Le \$700 to have the damage repaired.

Two months later, on March 15, 2008, Le and Vo were about to depart from the parking lot at the restaurant where Vo worked when Le paused to check for nails behind his rear tires. He found four or five two-inch nails set to point upward behind the rear tire. After clearing the nails, Le drove out of the parking lot with Vo in the passenger seat. Defendant followed them in his car. Le and Vo proceeded to the freeway; Le was driving at highway speed when defendant hit the Lexus from behind; Le lost control and hit the center divider. Defendant appeared at the passenger door holding a wrench. Le wrested the tool from defendant and placed it in the Lexus. Defendant offered to take Vo to the hospital. With Le's help defendant put Vo into his car. Rather than taking her to the hospital, defendant took Vo home. Vo awoke the next morning to discover that she

was in great pain. At the hospital she was found to have lost four teeth; she had abrasions, a concussion, fractured rib, and a fractured cervical vertebra. Le had a large bruise on his forehead and a jagged laceration on his neck. His Lexus was totaled.

II. PROCEDURAL BACKGROUND

Defendant was charged with two counts of assault with a deadly weapon or with force likely to cause great bodily injury. (§ 245, subd. (a)(1).) Both counts carried allegations that defendant personally used a deadly and dangerous weapon (an automobile) (§§ 12022, subd. (b)(1), 667, 1192.7) and that he personally inflicted great bodily injury (§ 12022.7, subd. (a)). Defendant was also charged with presenting a false insurance claim (§ 550, subd. (a)(1)), which concerned his postaccident communication with his insurance company, vandalism (§ 594, subs. (a), (b)(1)), which related to his smashing the windows on the Lexus, and giving false information to a peace officer (Veh. Code, § 31). The information alleged that defendant had suffered one prior strike conviction (§§ 667, subs. (b)-(i), 1170.12) and one conviction of a prior serious felony (§ 667, subd. (a)). Both allegations were based upon the 2003 arson.

The trial court appointed John Greene, M.D., a psychiatrist, to evaluate defendant's competency. Greene examined defendant on December 10, 2008. Defendant reported that he experienced stress and anxiety. He said that the last time he was in jail he had "stress, headaches, my brain stopped working" and was evaluated by psychiatric services. He said that he had been offered medications but had "refused" to take them. His sentence was "changed to one year and one strike, because I was feeling suicidal. They told me they were afraid that if I was going to prison I would commit suicide." He denied taking any psychiatric medications after his release. After his most recent arrest, he began having headaches and was started on Prozac. Greene found defendant was competent in that he was able to understand the nature of the proceedings and was able to assist in the conduct of his defense. Greene's opinion that defendant suffered from

anxiety disorder was based solely upon defendant's report that he suffered symptoms of anxiety.

The matter was tried to the court. The trial court found defendant guilty as charged and the enhancement allegations to be true. Prior to sentencing defendant was evaluated by Rahn Minagawa, Ph.D., a clinical psychologist. Minagawa noted that defendant was raised in Vietnam. His mother left him in the care of his grandparents when he was in the third grade. When he was 18, defendant emigrated from Vietnam to the United States to live with extended family members who did not treat him well. Minagawa concluded that defendant has a borderline personality disorder, which Minagawa ranked as severe, and adjustment disorder with mixed anxiety and depression.

Minagawa's report sets forth the definition of borderline personality disorder contained in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM IV). The report also describes the symptoms defendant exhibited as frantic efforts to avoid abandonment, a pattern of unstable and intense interpersonal relationships, a markedly unstable self-image, self-damaging impulsivity, "recurrent suicidal and self-mutilating behaviors, displaying inappropriate and intense anger and having difficulty controlling that anger, and experiencing transient, severe dissociative symptoms." Minagawa concluded that defendant's diagnosis "reflects a serious condition that needs to be addressed through therapeutic intervention. The most common clinical course of this illness is one of chronic instability in early adulthood, with episodes of serious affective and impulsive dyscontrol and high levels of use of health and mental health resources. Although the tendency toward intense emotions, impulsivity, and intensity in relationships is often lifelong, individuals who engage in therapeutic intervention often show improvement beginning sometime in the first year. During the 30s and 40s, the majority of individuals with this disorder gain greater stability in their relationships and vocational functioning, and this is likely to be the case

[with] the [defendant] if he is provided with therapy and the chance to reintegrate into the community.”

Defendant filed a written request asking the trial court to exercise its discretion to strike the strike conviction. (§ 1385.) The trial court denied the request in a lengthy ruling. The court stated that it had considered defendant’s background and character, his social situation and feelings of abandonment. The trial court acknowledged that defendant had been diagnosed by one examiner as having an anxiety disorder and by another as having a severe borderline personality disorder and that defendant’s behavior in this case “fits squarely within the symptoms and behaviors associated with this disorder.”

The trial court also considered the circumstances of the prior strike offense and the current offenses, defendant’s educational background and work history and the fact that he has used his time in custody productively, having attained 11 certificates of completion of programs while in jail.

The trial court found: “The defendant--during the defendant’s presentence interview [defendant] reported above the strike offense he was first offered 33 years in the State prison, which was later reduced to one year in County jail with a strike, because he attempted suicide, and he was depressed. It appeared that the defendant had self awareness of his mental health issue long before he committed the instant offenses. His actions were directed toward Lee [*sic*] over at least a three month period of time and consisted of several instances he had ample time to contemplate his response to Vo’s dating relationship with Lee [*sic*]. The defendant had ample time to reflect between each incident leading up to the car collision. Plus he was placed on notice that such conduct had severe consequences for the victim and for himself from the strike conviction five years earlier.

“Neither interviewing doctor indicate[s] that although the defendant does suffer from a severe form of borderline personality disorder that the defendant did not have

control over his behavior. As time passed his conducts [*sic*] escalated in seriousness until it ended in forcing the victims into the center divide. Making matters worse, instead of waiting for an ambulance the defendant--the defendant pulled the severely injured victim Vo out of the car and dropped her off at home. The defendant's conduct shows very disruptive behavior.

"The circumstance of the current offenses the defendant continued conduct along the same lines escalating in seriousness and dangerousness outweigh the unfortunate circumstances of his childhood and resulting in the mental illness." Accordingly, the trial court refused to strike the strike offense and sentenced defendant to prison for 15 years and four months.

III. DISCUSSION

The only issue on appeal is whether the trial court abused its discretion in refusing to strike the strike. Section 1385 permits a trial court to strike an allegation of a prior felony conviction in cases brought under the Three Strikes law. (*Romero, supra*, 13 Cal.4th at pp. 529-530.) In ruling on a motion to strike priors under section 1385, the court "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." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

A defendant has the right to seek review of a court's decision not to strike a prior conviction. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) The court's decision is reviewed under the abuse of discretion standard, and the burden is on defendant to show that the court's decision was " "irrational or arbitrary." ' ' (*Ibid.*) " 'In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be

set aside on review.’ [Citation.] Concomitantly, ‘[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.” ’ ” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

Defendant argues that the trial court abused its discretion in this case because the court’s decision relied upon two facts that are not supported by the record: (1) neither of the two doctors that examined defendant found that he lacked control over his behavior, and (2) defendant had been aware of and failed to take steps to control his mental illness long before he committed the instant offense. The Attorney General maintains the record supports the court’s findings. The Attorney General is correct.

Defendant argues that Minagawa found him to suffer “dyscontrol” or the inability to control his behavior, a finding defendant argues that the trial court ignored. But as the Attorney General correctly points out, Minagawa’s only references to “dyscontrol” appear in his recitation of the DSM-IV definition of borderline personality disorder and his explanation of the most common clinical course for the disease. The symptoms he attributes to defendant involve defendant’s efforts to avoid abandonment, problems with interpersonal relationship, unstable self-image, and “inappropriate and intense anger and having difficult[y] controlling that anger.” Difficulty of control is not the same as “inability” to control. And there is no authority of which we are aware to support the conclusion that one who has difficulty controlling his anger falls outside the spirit of the Three Strikes law.

Defendant also maintains that the record fails to support the trial court’s finding that defendant had long been aware of his mental health problem and did not take steps to correct it. Again, we disagree. Defendant had a psychiatric evaluation while he was in jail in 2003. He was suicidal and was offered psychiatric medication but “refused” to take anything. Defendant argues that it was not until 2008, when he started taking Prozac, that he finally came to terms with his mental illness. But this does not contradict

the trial court's finding; to the contrary, it supports it. That is, the record shows that defendant was offered the opportunity to treat his mental condition in 2003 and he refused. It was not until after he engaged in more serious and violent behavior five years later that he took any steps toward control.

Defendant does not fault the balance of the trial court's rationale. Specifically, there is no dispute that defendant's conduct has been disruptive and of escalating seriousness and dangerousness. Nor is there any dispute that defendant has known that he could suffer severe consequences as a result of further dangerous conduct. In short, the record amply supports the trial court's conclusion that defendant does not fall outside the spirit of the Three Strikes Law. Because the trial court's conclusion is supported by the record we need not reach defendant's contention that he was deprived of due process of law. (U.S. Const., 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343.)

IV. DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.