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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JUAN MANUEL MORENO, Defendant and Appellant.	G031437 (Super. Ct. No. 97NF0498) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John J. Ryan, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Stephen S. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry J. T. Carlton, Larissa Karpovics Hendren, and Daniel Rogers, Deputy Attorneys General, for Plaintiff and Respondent.

In an unpublished opinion, we affirmed the convictions of Juan Manuel Moreno and his six codefendants for attempted murder with enhancements for committing the crime to benefit a street gang. (*People v. DeLeon et al.* (Jun. 28, 2001), G024465, G024667, G024668, G024669, G024670, G02497 & G025818 (hereafter *DeLeon*).)[1] We agreed with Moreno's contention that he had been improperly sentenced as a third strike offender under the "Three Strikes" law (Pen. Code, § 667, subds (b)-(i))[2] because one of his two prior juvenile adjudications did not qualify as a strike. We remanded for resentencing of Moreno as a second strike offender. He appeals, contending he was again improperly sentenced. We reject his arguments and affirm his sentence.

I

FACTS AND PROCEDURE

The facts are detailed in our prior opinion (*DeLeon, supra,* at pp. 4-7), which we incorporate by reference, and only briefly summarize here. Moreno, a La Jolla gang member, and several of his fellow gang members crashed a party being held at the victim's, Ernesto Cortez's house, but were allowed to stay. At some point, Ernesto encountered Moreno and his fellow gang members smoking marijuana in the yard. Ernesto asked them to refrain from using marijuana because his small children were present. One of the gang members (probably Moreno) at first agreed to comply with Ernesto's request, but other gang members apparently considered it an unbearable affront. Ernesto was set upon by eight of the gang members, including Moreno. They savagely beat him and one of the gang members stabbed Ernesto in the back. Ernesto's gapping wound required 28 stitches.

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[1] On our own motion, we take judicial notice of our file and our unpublished opinion in the prior appeal. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).)

[2] All further statutory references are to the Penal Code, unless otherwise indicated.

The information charged Moreno with one count of attempted murder and one count of assault with a deadly weapon and alleged the crimes were committed for the benefit of a criminal street gang. Moreno was also charged with having one prior serious felony conviction and two strike convictions arising from a juvenile adjudication in 1990 for assault with a deadly weapon by force likely to produce great bodily injury under section 245, subdivision (a)(1) and robbery by force or fear under section 211.

A jury convicted Moreno of attempted murder and found the gang benefit allegations to be true. In a bifurcated proceeding, the court found the prior serious felony conviction and strike allegations true. At sentencing, the court denied Moreno's motion to strike one or more of his prior convictions. The court sentenced Moreno to the third strike term of 25 years to life for attempted murder, plus a consecutive three-year term for the gang benefit enhancement, and a consecutive five-year term for the prior serious felony conviction.

In his first appeal, Moreno argued he was improperly sentenced under the Three Strikes law because neither of his juvenile adjudications qualified as strikes under section 667, subdivisions (d) and (e)(2), and section 1170.12, subdivisions (b) and (c)(2). We agreed the assault adjudication could not be utilized as a strike conviction. (*DeLeon, supra,* at pp. 43-44.) However, we rejected Moreno's contention that the robbery adjudication did not qualify. We remanded for resentencing instructing the trial court "[it] should vacate its finding Moreno's juvenile adjudication for assault with a deadly weapon was a prior conviction for purposes of the Three Strikes law. It should sentence Moreno as a second strike offender." (*DeLeon, supra,* at p. 46, fn. 25.)

On remand, a different trial judge conducted the sentencing hearing. The trial court denied Moreno's renewed motion to strike the prior (i.e., the robbery adjudication) and imposed the aggravated term of nine years for attempted murder, doubled to 18 pursuant to the Three Strikes law. The court again imposed a consecutive three-year term for the gang benefit enhancement and a consecutive five-year term for the

prior serious felony conviction. Moreno's revised sentence was for a total term of 26 years.

II

Moreno renews the argument made in his first appeal, i.e., his juvenile adjudication for robbery does not qualify as a strike conviction under the Three Strikes law. We conclude the law of the case doctrine precludes our reconsideration of his claim. (See *In re Rosenkrantz* (2002) 29 Cal.4th 616, 668 ["'law of the case'" doctrine generally precludes multiple appellate review of same issue in same case].)

"'[A] question presented and decided by an appellate court becomes thereafter the law of the case and . . . the rule is binding on the appellate court if the case again comes before it after having gone down to the lower court for further proceedings, the facts on the second appeal being the same as on the first. The reason of the rule is apparent. This court having declared the law, and the parties and the court below having acted upon it, as a matter of policy, the law as thus declared and acted upon, whether right or wrong, cannot afterward be changed. But for this salutary rule, litigation might go on indefinitely[.]' [Citation.]" (*People v. Neely* (1999) 70 Cal.App.4th 767, 782.)

Moreno raises the identical argument raised in his first appeal: the robbery adjudication is not a strike because simple robbery was not listed in Welfare and Institutions Code section 707, subdivision (b)(3) as it existed when the current offense occurred. (The prior version of Welfare and Institutions Code section 707, subdivision (b)(3) listed robbery when armed with a dangerous or deadly weapon, the current version does not contain the weapon requirement.) We need not reconsider our prior conclusion. The legal point was "'necessary to [our] prior decision,'" the matter was presented and decided by us, and application of the law of the case doctrine does not result in any injustice. (*People v. Shuey* (1975) 13 Cal.3d 835, 842, disapproved on other grounds in *People v. Bennett* (1998) 17 Cal.4th 373, 389-390, fn. 5.)

Moreno persists that we should reconsider because in our prior opinion we erroneously stated he had "conceded" a point he had not "conceded." In our prior opinion we explained the law: "Penal Code section 667, subdivision (d) allows a juvenile adjudication to constitute a strike if: (1) the juvenile was at least 16 years old when the crime was committed; (2) the crime is listed in Welfare and Institutions Code section 707, subdivision (b) *or* Penal Code section 667.5, subdivision (c) *or* Penal Code section 1192.7, subdivision (c); (3) the juvenile was found fit to be dealt with under the juvenile court law; and (4) the juvenile was judged a ward of the court because he committed an offense listed in Welfare and Institutions Code section 707, subdivision (b)." (*DeLeon, supra,* at p. 42.) We noted, "Moreno concede[d] all of the requirements were met except the second one[,]" and we then analyzed only the second element. We concluded that although simple robbery was not listed in Welfare and Institutions Code section 707, subdivision (b), because it was listed in section 1192.7, subdivision (c)(19) without qualification it constituted a strike. (*DeLeon, supra,* at p. 43.)

Moreno now complains he never "conceded" the fourth requirement of section 667, subdivision (d)(3) (i.e., he was adjudged a ward because he committed an offense listed in Welfare and Institutions Code section 707, subdivision (b)) was met. We question why Moreno never brought this to our attention via a rehearing petition before our prior opinion became final. Furthermore, in reviewing his original opening brief, Moreno certainly appeared to have conceded the fourth element was met. When describing the four requirements of section 667, subdivision (d)(3), he injected next to the fourth requirement that it was "true here" and he did not argue it was absent. Moreno has not shown any injustice resulting from application of the law of the case doctrine.

In any event, Moreno's position is untenable on its merits. As to his primary argument relating to the second element of section 667, subdivision (d)(3), that simple robbery does not qualify as a strike, we reject it for the same reasons articulated in our original opinion.

In supplemental briefing, Moreno for the first time challenges the fourth element of section 667, subdivision (d)(3). That challenge is also meritless. For the robbery adjudication to qualify as a strike, section 667, subdivision (d)(3)(D) requires that in the same juvenile proceeding Moreno had been "adjudged a ward of the court because of a Welfare and Institutions Code section 707(b) offense, *whether or not that offense is the same as the offense currently alleged as a strike*." (*People v. Garcia* (1999) 21 Cal.4th 1, 6, italics added.) Although simple robbery was not such an offense, "[a]ssault by any means of force likely to produce great bodily injury" was and is. (Welf. & Inst. Code, § 707, subd. (b)(14).) Accordingly, Moreno's assault adjudication (assault with a deadly weapon with force likely to produce great bodily injury) charged and found true at the same time as the robbery count, satisfied the fourth requirement of section 667, subdivision (d)(3).

Moreno argues that because we held the assault adjudication could not be used as a strike, it has become "constitutionally dead" and is now unavailable to satisfy the fourth element of section 667, subdivision (d)(3). Not surprisingly, Moreno cites no authority in support of his position. Our conclusion that the assault count could not be used as a strike was no more than that. It did not render the assault adjudication a nullity for other purposes. As the Supreme Court noted in *People v. Garcia, supra,* 21 Cal.4th at p. 8, the requirement of section 667, subdivision (d)(3)(D) is merely an "additional condition . . . to the use of a qualifying juvenile offense as a strike." That condition relates to the nature of the juvenile, not the nature of prior offense being used as a strike. (*Id.* at p. 7.)

Moreno also argues the assault adjudication might not qualify as a Welfare and Institutions Code section 707, subdivision (b) offense because it is not clear Moreno was the actual perpetrator of the assault as opposed to having merely aided and abetted the assault. The contention is also meritless.

The cases upon which Moreno relies are inapposite. *People v. Rodriguez* (1998) 17 Cal.4th 253, and *People v. Encinas* (1998) 62 Cal.App.4th 489, both considered whether the proof was adequate to establish prior assault convictions were "serious felonies" under section 1192.7, subdivision (c), and thus constituted strikes under the Three Strikes law. But section 1192.7, subdivision (c) contains specific qualifications as to the types of assaults that can be considered serious felonies. In *Rodriguez,* the defendant's prior assault conviction constituted a serious felony under section 1192.7, subdivision (c) only if the defendant had personally inflicted great bodily injury or personally used a firearm or deadly weapon (§ 1192.7, subds. (c)(8) & (c)(23)), but the prosecution proved only that the defendant had been convicted of assault. (*People v. Rodriguez, supra,* 17 Cal.4th at pp. 261-262.) In *Encinas,* the defendant's conviction for assault on a peace officer constituted a serious felony only if it was committed with a deadly weapon or instrument (§ 1192.7, subd. (c)(11)), but the prosecution offered no proof as to whether a deadly weapon was used. (*People v. Encinas, supra,* 62 Cal.App.4th at p. 492.) Here, "[a]ssault by any means of force likely to produce great bodily injury" is a Welfare and Institutions Code section 707, subdivision (b) offense. The statute requires only the fact of an adjudication for the assault offense, it does not further require a showing the juvenile was the actual perpetrator of the offense as opposed to having been an aider and abettor.

III

Moreno contends the court abused its discretion in imposing the aggravated term of nine years for attempted murder because the mitigating circumstances outweighed the aggravating. He also complains the court failed to state its reasons for imposing the aggravated term of three years for the gang benefit enhancement. We reject his claims.

"'Sentencing courts have wide discretion in weighing aggravating and mitigating factors [citations], and may balance them against each other in "qualitative as

well as quantitative terms" [citation] . . . . We must affirm unless there is a clear showing the sentence choice was arbitrary or irrational.' [Citations.]" (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.) We cannot say the court abused its discretion in imposing the aggravated term for attempted murder.

The sentencing court may impose the upper term if circumstances in aggravation outweigh the circumstances in mitigation. (Cal. Rules of Court, rule 4.420(b).) The sentencing court articulated several factors in aggravation including facts related to the crime (Cal. Rules of Court, rule 4.421(a)), and facts related to the defendant (Cal. Rules of Court, rule 4.421(b)). The sentencing court noted the crime involved great violence and callousness; the victim was vulnerable in view of the fact that he was set upon by eight gang members; a deadly weapon was used; there was great monetary loss to the victim in the form of over $20,000 in medical bills; Moreno's prior convictions were getting increasingly serious; his performance on probation was ineffective because he was sent to CYA for the prior juvenile adjudication; and was on probation when the current offense occurred. Although the court originally stated it did not believe there were any circumstances in mitigation, defense counsel pointed out some: Moreno had initially indicated he would comply with the victim's request that the men not smoke marijuana; it did not appear he was the actual stabber; he was remorseful; he had turned himself in to police; and he was improving himself while in prison. Nonetheless, the trial court found the aggravating factors substantially outweighed the mitigating, and imposed the upper term for attempted murder and for the gang enhancement. It did not abuse its discretion.

Moreno suggests he could only be sentenced to the legislatively preferred middle term because he was merely an aider and abettor. He states, "[A]n aider and abettor can merely be an aider and abettor and could not do so in an aggravated or mitigated manner." He cites no authority for this proposition. While Moreno might not have been the actual stabber, he did participate in the attack on Ernesto. In selecting the

upper term, the court was entitled to consider the facts surrounding the offense and facts about Moreno such as his past criminal record. We find no error here.

Moreno's related complaint is that the sentencing court failed to articulate reasons for imposing an aggravated term for the gang enhancement. Moreno's failure to object waives the argument on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 355.)

As an alternative, Moreno argues defense counsel's failure to raise the alleged sentencing error below constituted ineffective assistance of counsel. But we cannot say that even had defense counsel objected, a different result would have been obtained. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Pope* (1979) 23 Cal.3d 412, 426; *People v. Alvarado* (2001) 87 Cal.App.4th 178, 194.) The original sentencing court had imposed the upper term. There was some question on the part of this sentencing court as to whether our remand was for the limited purpose of imposing a determinate term for attempted murder as a second (not third) strike offense, or if the court was free to completely resentence Moreno anew. The court commented that even if the remand "was for all purposes, I would not change the sentence. What I would do is I would add some aggravating factors to the gang allegation. And you noticed I had a whole bunch of them left that I could have used that I mentioned." As noted above, the sentencing court articulated a number of aggravating factors supporting the upper term for attempted murder. It is clear the court would have utilized one or more of them to support the upper term for the gang enhancement as well and the same sentence would have resulted.

IV

Moreno argues the sentencing court abused its discretion by refusing to strike his remaining prior so he could be sentenced outside the Three Strikes law. We find no error.

A sentencing court has discretion to dismiss a strike allegation. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530.) To dismiss a strike the court

must consider whether, considering the nature and circumstances of his or her present criminal activity and prior strikes, the defendant may be deemed outside the spirit of the Three Strikes law's sentencing scheme, and therefore should be treated as though he or she had not committed one or more of the serious or violent felonies alleged as strikes. (*People v. Williams* (1998) 17 Cal.4th 148, 162-163.) We review the sentencing court's ruling "'for *abuse of discretion*. This standard is *deferential*. [Citations.] But it is not empty. Although variously phrased in various decisions [citation], it asks in substance whether the ruling in question "*falls outside the bounds of reason*" under the applicable law and the relevant facts [citations].' [Citation.]" (*People v. Garcia* (1999) 20 Cal.4th 490, 503.)

Moreno argues the following factors compelled dismissal of his remaining strike: (1) His robbery strike was an innocuous offense—it occurred 12 years before this offense, when he was just 16 years old, and involved stealing shoes off someone's feet; (2) he was not the stabber in this case, but a mere aider and abettor; (3) he had originally agreed to comply with Ernesto's request that the men not smoke marijuana; (4) he was remorseful and had turned himself in to police; and (5) his behavior had improved while in prison.

Moreno complains the sentencing court merely deferred to the original sentencing court's denial of his request that one or more of his prior felony convictions be struck. To the contrary, the record indicates this sentencing court independently considered the request, but found no reason to rule differently. The court commented, "[t]his isn't the type of case where I would consider striking a strike. . . . [¶] . . . [¶] . . . I am not inclined to strike it. It was a robbery. You can say, well, it was a robbery of shoes, but the shoes were on somebody's feet. You know, it is just not the type of contact that is diminimus, [and] the felony in this case, actually very, very, very brutal."

Moreno compares this case with *People v. Bishop* (1997) 56 Cal.App.4th 1245 (hereafter *Bishop*), in which the sentencing court's decision to strike prior robbery convictions was upheld. The situations are hardly analogous. The current offense in *Bishop* was a nonviolent "wobbler" offense (petty theft with a prior) and the strikes were almost 20 years old. (*Id.* at p. 1248.) Nothing in *Bishop* supports Moreno's assertion that as a matter of law his prior conviction should have been stricken.

Moreno also compares his case to that of the defendant in *People v. Cluff* (2001) 87 Cal.App.4th 991 (hereafter *Cluff*), in which the appellate court found the trial court had abused its discretion by refusing to strike a prior conviction. Again, there is simply no comparison. In *Cluff*, the current offense was a technical violation of a new statute requiring registered sex offenders to annually update their registrations. The defendant had continuously lived at the address where he had initially registered and the recently enacted annual updating requirement had been omitted from the only document he was allowed to keep when he initially registered.

Unlike the nonviolent current offenses involved in *Bishop* or *Cluff*, this prosecution involved an extremely violent and brutal gang attack on a party host for having the temerity to ask Moreno and his fellow gang members to refrain from smoking marijuana in front of small children. Eight men, including Moreno, jumped Ernesto, beat him savagely, and stabbed him leaving a gapping wound down the length of his back. Moreno's prior robbery adjudication was not so innocent. He and other gang members assaulted the victim, "poking" him with a screwdriver, while Moreno took the victim's shoes. Although originally sent to Joplin Youth Center, Moreno escaped and was subsequently committed to the California Youth Authority (CYA). He had a subsequent juvenile adjudication for stealing a car and was again committed to CYA. As an adult, he had a conviction for possession of a dirk and other convictions as well. Moreno admitted to the probation officer that he was armed with a knife when the attack on Ernesto occurred, but claimed that because he was intoxicated he could not recall if he was the

stabber. Given the severity of the current offense and Moreno's criminal history, he was not someone entitled to be "deemed outside the spirit of the Three Strikes law . . . ." (*People v. Williams, supra,* 17 Cal.4th at pp. 162-163.)

V

Finally, Moreno argues his 26-year sentence under the Three Strikes law constitutes cruel and unusual punishment under the federal and California Constitutions. Moreno failed to raise the issue of cruel and unusual punishment below. Accordingly, the argument is waived on appeal. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27; *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8.) Nonetheless, to forestall the inevitable ineffective assistance of counsel claim we consider and reject the merits of his claim.

Preliminarily, we disagree with Moreno's characterization of his sentence. He complains he has been excessively sentenced for merely having "stole[n] a pair of shoes" as a juvenile. But that ignores that his sentence is for his *current* offense, a particularly brutal attempted murder, and was enhanced because of his prior criminal record.

As to Moreno's Eighth Amendment claim, the United States Supreme Court has upheld California's Three Strikes law against a cruel and unusual punishment argument for a defendant whose current offense was nonviolent and minor. (*Ewing v. California* (2003) 538 U.S. 11 [theft of three golf clubs worth $399 apiece]; see also *Lockyer v. Andrade* (2003) 538 U.S. 63). If those sentences were not cruel and unusual, a fortiori, neither is the sentence imposed for the present extremely violent attempted murder offense given Moreno's criminal history.

As to Moreno's claim that his sentence violates the California Constitution, to assail any given sentence as disproportionate, an appellant bears the considerable burden to show the sentence is so disproportionate that it "'shocks the conscience and offends fundamental notions of human dignity.'" (*People v. Cartwright* (1995)

39 Cal.App.4th 1123, 1130, 1136; *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 529-532.) In reviewing such a claim it is appropriate to consider the nature of the offense and the offender, and the degree of danger to society. (*In re Lynch* (1972) 8 Cal.3d 410, 425.) Moreno stands currently convicted for his participation in a brutal attempted murder. He is a member of a criminal street gang, and has a lengthy criminal history that involves not only his prior robbery adjudication, but adjudications for assault with a deadly weapon, burglary, car theft, and receiving stolen property. He was on probation when the current offense was committed. Less severe sanctions apparently have not made an impression upon him and the only way to protect society from his violent behavior is by means of the sentence imposed.

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.