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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

SHAWN TOWNE,

Defendant and Appellant.

B166312

(Los Angeles County
Super. Ct. No. PA040926)

APPEAL from a judgment of the Superior Court of Los Angeles County, Meredith C. Taylor, Judge. Affirmed.

Jonathan B. Steiner and Suzan E. Hier, under appointments by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

Shawn Towne appeals from judgment entered following a jury trial in which he was convicted of one count of the unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)) and his admission of a prior conviction within the meaning of Penal Code section 666.5, a serious or violent felony conviction within the meaning of Penal Code sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d), a prior conviction for a serious felony within the meaning of Penal Code section 667, subdivisions (a)(1), and two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). Sentenced to prison for eight years, he contends the trial court abused its discretion by imposing the upper term and doubling it after refusing to grant his *Romero*[1] motion. For reasons explained in the opinion, we affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

In the evening on March 31, 2002, Noe Arana went out with a friend to a club in West Hollywood. After leaving the club, he met appellant on a street corner and they agreed "to hook up or something." Appellant entered Arana's car and they drove to different locations, looking for a room. After a while, appellant appeared to be falling asleep, and Arana decided to drive back to the valley, an area with which he was more familiar, to get a motel room. Arana drove to an area off the 210 Freeway, where he stopped the car and tapped appellant on the shoulder. Arana testified appellant "just went crazy" when Arana asked appellant what was wrong and "Are we still up for it?" The two men punched each other and struggled, falling to the ground outside of the car. Arana did not know how his windshield got cracked and testified he was "freaked out" and afraid. He claimed appellant took Arana's car keys and threatened to take his car and his

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[1] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

possessions. After tying up Arana, appellant drove dangerously and erratically and demanded money. Arana had only $40 or $50 dollars and told appellant to take what he wanted. Arana escaped hours later and ran toward condominiums, where he told people he had been kidnapped, that his car had been stolen and to call the police.

On April 1, at approximately 10:15 a.m., Los Angeles Police Officer Paul Lopez responded to a stolen vehicle tracking system alert and pulled over Arana's vehicle, being driven by appellant. Appellant got out of the vehicle, put his hands in the air and said, "This car is stolen. I had nothing to do with it, but my friend stole it." After police officers took appellant into custody and told him why he was being detained, appellant stated, "This car is a friend's. I'm going to meet him right now in the valley. Some guy beat me up this morning in the car in Orange County, and I'm going to the nearest police station to report that some guy beat me up. I'm the victim here."

Appellant testified in his own defense that he is a prostitute and was working the evening of March 31. At approximately midnight, Arana was driving down the street and picked up appellant. They agreed to have sex and get a hotel room. They drove around for hours and appellant fell asleep. He woke up with Arana on top of him, strangling him with a cell phone cord. Arana apologized and appellant agreed to get back in the car as long as Arana agreed to have his hands tied up. Arana said he didn't mean to try to kill appellant and needed help. He offered to pay appellant $400 not to report the incident to the police and gave appellant two credit cards and the PIN for them. Appellant went into a 7-11 store and left Arana in the car. When appellant looked back, he saw that Arana was no longer in the car. Appellant eventually drove the car home. Thereafter, he telephoned the registered owner of the car and was in the process of driving the car back to the valley when he was arrested.

While appellant was found guilty of the unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)), he was found not guilty of carjacking (Pen. Code, § 215, subd. (a)), kidnapping (Pen. Code, § 207, subd. (a)), second degree robbery (Pen. Code, § 211), grand theft auto (Pen. Code, § 487, subd. (d)), criminal threats (Pen. Code, § 422), kidnapping for carjacking (Pen. Code, § 209.5, subd. (a)), and kidnapping to commit robbery (Pen. Code, § 209, subd. (b)(1)).

At sentencing, the court denied appellant's motion to declare the offense a misdemeanor, finding that it was appropriate that the matter be before the court as a felony. The court stated further, "With respect to striking the strike, the strikes date from '95; and he's had a number of other adverse encounters . . . with law enforcement since then. [¶] In '96, felony joyriding; in '99 prostitution related type matters; and 2000 grand theft auto and Penal Code 69 [obstructing or resisting officers in performance of their duties]. [¶] I don't believe it would be an appropriate exercise of discretion to strike the strike." The court stated while it did not believe all of the victim's testimony or all of appellant's testimony, it did believe the testimony of two witnesses that after Arana ran from the car, he was significantly terrified and afraid for his own physical well being. The court stated it believed the victim left the car thinking if he did not he would be killed. The court observed it did not consider the crime to be "just a simple 10851(a) as [it had] just described . . . and that it's an aggravated situation based on what [the court had] just described."

The court determined it was not appropriate to give appellant the low or middle term in that he had a "ten year history" before this case. Addressing appellant, the court observed "you are an innocent of sorts; that you don't seem despite all of this contact with law enforcement and the court system to learn what punishment is and what it means. [¶] Here you are. You're back again. [¶] So the court is considering the trial as it took place before the court, the

conviction on the 10851(a), the fact that you have a lengthy history in choosing the high term of four years; and the high term is because the 10851 (a) is alleged pursuant to . . . Penal Code 666.5." With regard to the state prison priors, the court noted the number of times appellant had been to state prison made him a recidivist but that based on the circumstances before the court, his history, his nature, the sentence he would serve and the fact that he would be doing 80 percent of the time imposed, it was appropriate to strike the state prison priors, also "recognizing that one of them constitutes the same conviction on which [appellant was] getting the strike time."

DISCUSSION

Appellant contends the trial court abused its discretion by refusing to strike the "strike," his 1995 robbery conviction.

Respondent argues that appellant's contention must be summarily rejected as appellate review is not available. We reject the People's assertion and review the court's exercise of discretion under *Romero*. (*People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.)

We "review rulings on motions to strike prior convictions when the issue is raised under the deferential abuse of discretion standard. Under that standard an appellant who seeks reversal must demonstrate that the trial court's decision was irrational or arbitrary. It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance. [Citation.]" (*People v. Myers*, *supra,* 69 Cal.App.4th 305, 309-310.)

"[We] 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.)

The record establishes the court considered all of the relevant circumstances and properly exercised its discretion by refusing to strike appellant's prior conviction. (*People v. Gaston* (1999) 74 Cal.App.4th 310, 320-321; *People v. Myers, supra,* 69 Cal.App.4th at p. 310; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1337.)[2]

Additionally, the trial court did not abuse its discretion by imposing the upper term. Contrary to appellant's claim, the jury's necessary findings on the acquitted counts did not conflict with the court's findings. The court was well aware of the jury's findings, acknowledged the victim lied and observed that the jury had been able to weigh the evidence and make credibility findings in reaching its verdicts. Moreover, even if there had been error, it would have been harmless. "A single factor in aggravation will support imposition of an upper term. [Citation.] 'When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper.' [Citation.]" (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433-434.)[3]

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[2] The court's misstatement that appellant had a 2000 conviction for grand theft auto rather than a conviction for resisting an officer in violation of Penal Code section 69 does not diminish the court's finding that appellant had a lengthy criminal history.

[3] Further, the trial court could have used as reasons that appellant had served prior prison terms, his prior performance on probation or parole was unsatisfactory and that he was on parole at the time of the current offense. (See *People v. Steele* (2000) 83 Cal.App.4th 212, 227.)

DISPOSITION

The judgment is affirmed.

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CURRY, J.

We concur:

EPSTEIN, Acting P.J.

HASTINGS, J.