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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.

NATHAN OWEN HILL,

Defendant and Appellant.

B282098

(Los Angeles County
Super. Ct. No. YA095111)

APPEAL from a judgment of the Superior Court of Los Angeles County, George G. Lomeli, Judge. Affirmed in part and reversed in part, with directions.

William G. Holzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Nathan Owen Hill was convicted, following a jury trial, of simple assault (Pen. Code, § 240)¹, assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)), resisting, delaying or obstructing a peace officer (§ 148, subd. (a)(1)), and two counts of resisting, by threat or violence, an executive officer in the performance of his or her duties (§ 69, subd. (a)). Pertinent here, the jury found true the allegation that appellant sustained a prior strike conviction for aggravated assault within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12).

On appeal, appellant contends insufficient evidence supports the jury's finding that his prior conviction constituted a strike offense under subdivision (e)(1) of section 667. The Attorney General concedes this claim of error, which we accept. We reverse the true finding regarding the prior strike allegation, remand the cause with directions, and otherwise affirm the remainder of the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On September 23, 2016, Alternative Deputy Public Defender Steve Kwon represented appellant in a criminal case. Appellant sought to discharge Mr. Kwon and to secure the appointment of new counsel.² The trial court denied appellant's request after holding a *Marsden* hearing.

Appellant attempted to stand up from counsel's table after the court denied his *Marsden* request. When Mr. Kwon blocked appellant using his arm, they both got "tangled up" and fell to the

¹ All further statutory references are to this code.

² *People v. Marsden* (1970) 2 Cal.3d 118.

ground. Appellant kicked Mr. Kwon several times while they struggled on the ground.

Los Angeles County Sheriff's Deputy Elmer Montano, the courtroom bailiff, rushed to Mr. Kwon's assistance. Deputy Montano struggled to hold appellant down on the floor with the assistance of his partner, Deputy Scott Volmerding. Appellant resisted, tried to stand up and refused to comply with the deputies' orders to stop resisting.

Additional deputies arrived, placing appellant in a hobble restraint device to prevent him from kicking. Appellant continued resisting and kicking. Appellant complied only after being pepper sprayed. Mr. Kwon suffered a laceration to his head, requiring medical treatment by paramedics and a physician at the hospital.

Appellant was charged with assault on a public official (§ 217.1, subd. (a) [count 1]), assault by means of force likely to cause great bodily injury (§ 245, subd. (a)(4) [count 2]), two counts of preventing an executive officer from performing a lawful duty (§ 69, subd. (a) [counts 3 and 4]), and resisting, delaying or obstructing a peace officer (§ 148, subd. (a)(1) [count 5]). The information further alleged appellant suffered a prior serious felony conviction for aggravated assault in 1996.

A jury found appellant guilty as charged, except it found him guilty of a lesser-included offense of simple assault as to count 1. The jury also found true the prior strike allegation.

The trial court sentenced appellant to a total of 10 years and eight months in state prison. The sentence consisted of the high term of four years as to count 2, doubled for the prior strike enhancement. (§ 667, subd. (e)(1).) As to counts 3 and 4, the court imposed one-third the midterm of eight months, also

doubled on each count, to be served consecutively to the sentence imposed in count 2. Regarding counts 1 and 5, the court imposed 180-day and one-year jail terms respectively, but stayed both terms pursuant to section 654. Appellant filed a timely notice of appeal.

DISCUSSION

Appellant argues insufficient evidence supports the finding that his prior aggravated assault conviction constituted a strike offense. The Attorney General concedes the record contains no evidence specifying whether the assault was committed with a deadly weapon and, in the absence of such evidence, the court must presume appellant committed the least serious form of section 245—i.e., assault with intent to commit great bodily injury. We agree.

A defendant who previously has been convicted of a serious or violent felony shall be sentenced to twice the term provided as punishment for the current felony conviction. (§ 667, subd. (e)(1).) A “serious felony” for the purpose of this determination is defined by subdivision (c) of section 1192.7.

Appellant’s alleged prior serious felony conviction was for violating section 245, subdivision (a)(1). That statute, as it existed in 1996, made it a felony to commit an assault with a deadly weapon or instrument, or by force likely to produce great bodily injury. (Former § 245, subd. (a)(1).) Assault with a deadly weapon constitutes a serious felony, as does any felony in which the defendant personally uses a dangerous or deadly weapon. (§ 1192.7, subds. (c)(23), (31).) However, assault by means likely to produce great bodily injury, without the additional element of personal infliction, is not included in the list of serious felonies.

(*People v. Delgado* (2008) 43 Cal.4th 1059, 1065.)

In other words, “[a]lthough use of a deadly weapon and great bodily injury [a]re interchangeable for purposes of conviction under former section 245, subdivision (a)(1), under the Three Strikes law only assault with a deadly weapon constitutes a serious felony. [Citations.] Accordingly, the mere fact of a conviction for aggravated assault under former section 245, subdivision (a)(1) would be insufficient to establish the prior conviction was a strike in any case in which the verdict or plea did not specify the precise means used to commit the offense.” (*People v. Learnard* (2016) 4 Cal.App.5th 1117, 1122.)

The prosecution bears the burden to prove each element of a sentence enhancement allegation beyond a reasonable doubt. (*People v. Delgado, supra*, 43 Cal.4th at p. 1067.) “[O]fficial government records clearly describing a prior conviction presumptively establish that the conviction in fact occurred, assuming those records meet the threshold standards of admissibility. [Citation.]” (*Id.* at p. 1066.) But where, as here, an offense can be committed in multiple ways, and the admissible record of conviction does not indicate how it was committed, the court must presume the conviction was for the least serious form of the offense. (*Id.* at p. 1066; *People v. Rodriguez* (1998) 17 Cal.4th 253, 261–262.)

We review the record in the light most favorable to the judgment to determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt. (*People v. Delgado, supra*, 43 Cal.4th at p. 1067.) Thus, unless there is substantial evidence that appellant’s prior conviction was based on the use of a deadly weapon, it cannot be

treated as a serious felony for purposes of the Three Strikes law. (*People v. Williams* (1996) 50 Cal.App.4th 1405, 1412.)

As evidence of the nature of appellant's 1996 conviction, the People introduced a package of certified documents pertaining to the prior offense, also known as a section 969b packet. The packet included the abstract of judgment, which contains the following handwritten note: "ass w/dead weap. Means of force prod grt bod inj".

The People also called Kristina Gonzales to testify as an expert witness. Ms. Gonzales is employed as a Legal Support Office Assistant in the District Attorney's "Priors Section". Ms. Gonzales testified the abstract of judgment reflects that appellant was convicted of assault with a deadly weapon in 1996. No other evidence was introduced to support the prior strike allegation. The jury ultimately found the allegation true, and appellant's sentence was doubled, based on this finding, as to counts 2, 3 and 4.

The abstract of judgment was deficient to establish the prior strike because it did not show whether appellant used a deadly weapon during commission of the 1996 assault. (See *People v. Williams, supra*, 50 Cal.App.4th at p. 1412.) The People did not offer any other evidence from the record of conviction, such as a reporter's transcript. On this record, the People's evidence was insufficient to prove, beyond a reasonable doubt, that appellant's prior assault conviction could be treated as a serious felony for purposes of the Three Strikes law. (*Ibid.*)

Turning to the remedy, both parties agree the matter must be remanded for retrial on the prior conviction. (*People v. Barragan* (2004) 32 Cal.4th 236 [no constitutional bar to retrial of a prior strike allegation]; *People v. Monge* (1997) 16 Cal.4th 826,

843–845 [prohibition against double jeopardy does not bar the retrial of a prior conviction allegation after reversal based on insufficient evidence].) We agree.

DISPOSITION

The true finding concerning appellant’s prior strike conviction is vacated, and the sentence enhancement imposed pursuant to subdivision (e)(1) of section 667 is reversed. The matter is remanded for retrial of the prior strike allegation, if the People elect to do so, and for resentencing if the finding is not sustained. The judgment is affirmed in all other respects.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.