Filed 10/24/17 P. v. King CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM KENNETH KING, JR., Defendant and Appellant.	B271924 Los Angeles County Super. Ct. No. BA436801

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick N. Wapner, Judge. Affirmed in part, reversed in part, and remanded with directions.

Christopher Love, 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, Senior Assistant Attorney General, Noah P. Hill and Louis W. Karlin, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant William Kenneth King, Jr. appeals from the judgment entered after a jury convicted him of attempting to bomb a hospital with a Molotov cocktail. Appellate counsel filed an opening brief in which he raised no issues (*People v. Wende* (1979) 25 Cal.3d 436), and we requested briefing on several issues related to defendant's alleged strike prior. Defendant now contends that there is insufficient evidence his prior conviction was a strike offense and that the trial court's resolution of that question violated his Sixth Amendment right to a jury trial. The People concede the former point but dispute the latter.

We conclude there is insufficient evidence to prove that defendant's prior conviction—for evading a police officer causing injury—is a strike, because neither the elements of the crime nor the evidence presented established that defendant personally inflicted great bodily injury on a non-accomplice. We also conclude the case must be remanded for further proceedings to determine what evidence, if any, the prosecution will produce to prove that fact. Accordingly, we reverse the findings on the strike allegation and remand for a new priors trial. In all other respects, we affirm.

FACTUAL BACKGROUND

On May 15, 2015, at approximately 8:00 p.m., nurse Krishinda Smith was working in the emergency department at California Hospital in Los Angeles. Defendant entered the emergency room. When the triage nurse failed to see him quickly enough, he grew upset and yelled at Smith using offensive language. Smith called security. Hospital security guard Chris Borquez responded and escorted defendant outside. Defendant

told Borquez he was going to come back and blow up the hospital. Surveillance cameras captured video of the encounter, but no sound.

Defendant returned to the hospital 30 to 60 minutes later. He stood on the sidewalk outside the emergency room door, reached into a brown paper bag, and removed an item Borquez believed was a Molotov cocktail.[1] The paper bag fell to the ground. Defendant was holding a glass bottle with a protruding rag. According to security guard Christopher Maldonado, defendant said, "I'm going to blow this place up." As he held the bottle in his left hand, he attempted to light the rag with a lighter held in his right hand. When the lighter malfunctioned, defendant ran away, dropping the rag as he fled. After defendant left, the guards found the paper bag and the rag on the sidewalk.

An arson investigator collected the bag and the rag and sent them for analysis. The rag was noticeably wet and had an odor consistent with a petroleum product like gasoline. Analysis of both objects revealed the presence of an ignitable liquid described as a medium petroleum distillate. The liquid had a flashpoint of 114 degrees.

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[1] "Molotov cocktail" is a generic term for a bottle-based incendiary grenade. Typically, a glass bottle is filled with a flammable liquid; a rag inserted into the top of the bottle acts as a wick. When the wick is ignited, the glass bottle explodes, causing surrounding objects to catch fire. (See Pen. Code, § 16460, subd. (a)(5).) According to trial testimony, the process requires a liquid with a maximum flashpoint of 150, but any petroleum distillate will work.

PROCEDURAL BACKGROUND

By information filed July 9, 2015, defendant was charged with one count of use or attempted use of an explosive device (Pen. Code, § 18740; count 1), one count of attempt to burn (Pen. Code, § 455; count 2), and one count of criminal threats (Pen. Code, § 422, subd. (a); count 3). The information also alleged that defendant had previously been convicted of violating Vehicle Code section 2800.3, and that the conviction was a serious or violent felony under the Three Strikes law. (Pen. Code, §§ 667, subds. (b)–(j), 1170.12, subds. (a)–(d).) Defendant pled not guilty and denied the allegation.

After a bifurcated trial at which he did not testify, defendant was convicted of all counts. During deliberations, the jury asked for guidance in reaching a unanimous decision on counts 1 and 2. The record does not indicate that the court consulted counsel before replying that the jury should continue deliberating. Ultimately, after deliberating for five-and-a-half hours over three days, the jury reached a decision on the substantive counts. Following the verdicts on the substantive charges, jury trial began for the strike allegation.

At the priors trial, the prosecution relied on three exhibits. To prove the existence and nature of the prior conviction, the prosecution presented certified minute orders from case no. KA043325.[2] According to the minute order of April 13, 1999, the defendant in case no. KA043325 was "advised of and personally and explicitly waive[d]" his constitutional trial rights. As relevant here, it also established that the defendant pled no

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[2] The prosecution did not provide any other documents from the record of conviction or a Penal Code section 969b packet.

contest to evading a peace officer with great bodily injury (Veh. Code, § 2800.3, subd. (a)).

The prosecution presented two additional exhibits to prove that defendant was the person who had been convicted in case no. KA043325. Exhibit 6 was defendant's booking photograph from his June 14, 2015, arrest in this case. Exhibit 7 was a partially-redacted printout from the California Law Enforcement Telecommunications System (CLETS), which reported criminal history information relating to an individual alternatively identified as William King Jr., William Kenneth King, William King, William Kenneth King Jr., and Rey Guillermo. The printout, which also contained four different social security numbers, warned: "The entries provided below are based upon an arrest or court disposition report. The subject of the entry has been identified with this record based upon soft criteria consisting of a name or number match. Positive identification has not been made because fingerprints were not received for the entries. Use of this information is the receivers [*sic*] responsibility." The report noted that in the 1999 case, defendant had been arrested by the Sheriff's Department, but the sheriff had not transmitted the arrest data to the Department of Justice.[3] A paralegal from the District Attorney's Office testified that the Department of Justice typically entered information into CLETS based on superior court minute orders.

At the end of the paralegal's testimony, the defense argued that while there was evidence that defendant was the person in

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[3] That entry conflicts with the minute order, which indicates that the defendant in the 1999 case was arrested by the West Covina Police Department.

the CLETS report, and while the 1999 conviction appeared in the report, there was no evidence that the Department of Justice had attached the 1999 conviction to the correct person. Since the prosecution did not present any photographs, fingerprints, or other evidence to establish the identity of the person convicted in the 1999 case, and since the minute orders in that case did not contain defendant's unique CII number, there was no way to tell whether defendant was indeed that person. Accordingly, the defense moved to dismiss the alleged prior.

The court concluded the prosecution had established defendant's identity beyond a reasonable doubt. (Pen. Code, § 1025, subd. (c).) Referring to the warning in the CLETS report, the court noted, "it says also soft criteria consisting of a name or number match. [¶] Well, the number match has got to be the CII number so I don't have a reasonable doubt that it's him so I find that it's him and the convictions." (*Sic*.)[4]

Next, the jury was instructed that the court had concluded defendant was the person named in exhibits 6–8, and was told to determine whether he had been convicted of violating Vehicle Code section 2800.3 on April 13, 1999, in case no. KA043325. The jury found the allegation that defendant was convicted of "evading a police officer, … causing serious bodily injury" in the

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[4] The record does not reveal the basis for the court's conclusion that notwithstanding defendant's CII number did not appear on the court's minute order and notwithstanding the prosecutor's concession that the CLETS entry was based on that minute order, the "soft criteria" the Department of Justice used to tie the conviction to defendant was a number match rather than a name match. Though we express no opinion about whether the evidence was sufficient to establish defendant's identity, we note that on remand, the prosecution retains the burden of proving identity beyond a reasonable doubt.

prior case true. It was not instructed to determine—and did not determine—whether defendant personally inflicted great bodily injury on a non-accomplice in the commission of that offense.

At sentencing, the court held that "the strike conduct is a driving offense for which somebody was seriously injured so that's a strike." The court denied defendant's motion to strike the prior, denied the defense motion for a new trial, and sentenced defendant to an aggregate term of 15 years and four months in state prison.

The court selected count 1 (Pen. Code, § 18740) as the base term and sentenced defendant to 14 years—the upper term of seven years, doubled for the strike prior. The court imposed 16 months for count 3 (Pen. Code, § 422, subd. (a))—one-third the middle term of two years, doubled for the strike prior—to run consecutively. The court stayed count 2 (Pen. Code, § 455) under Penal Code section 654. Finally, the court recommended that the Department of Corrections and Rehabilitation house defendant in a mental health facility.

Defendant filed a timely notice of appeal and we appointed counsel to represent him. On June 14, 2016, appointed counsel filed a brief in which he raised no issues and asked us to review the record independently. (*People v. Wende*, *supra*, 25 Cal.3d at p. 443.)

After reviewing the record, the superior court file, and the exhibits, we asked appellate counsel and the People to provide us with supplemental briefing on several issues related to defendant's prior conviction: Was the evidence sufficient to establish that the prior conviction qualified as a strike offense? Under the Sixth Amendment, should that issue have been resolved by the jury rather than by the court? If the evidence

was insufficient or the proceedings violated the Sixth Amendment, what is the proper remedy?

DISCUSSION

In response to our request for supplemental briefing, defendant argues, and the People agree, that there is insufficient evidence to support the court's finding that defendant's 1999 conviction for violating Vehicle Code section 2800.3 qualified as a serious felony under the Three Strikes law. The parties also agree that we must remand for a further evidentiary proceeding, but appear to disagree about the precise nature of that proceeding. Defendant argues that under *Descamps v. United States* (2013) 570 U.S. __ [133 S.Ct. 2276] (*Descamps*), he has a Sixth Amendment right to a jury determination of whether he personally inflicted great bodily injury on a non-accomplice. The People contend that under *Descamps*, the trial court may first examine the record of conviction in the prior case to determine whether defendant admitted facts sufficient to establish the strike; a jury need resolve only *disputed* factual issues.

1. There is insufficient evidence to support the strike finding.

A criminal defendant may not be convicted of any crime or enhancement unless the prosecution proves every fact necessary for conviction beyond a reasonable doubt. (U.S. Const., 5th Amend.; U.S. Const., 14th Amend.; see Cal. Const., art. I, §§ 7, 15; *In re Winship* (1970) 397 U.S. 358, 364; *People v. Tenner* (1993) 6 Cal.4th 559, 566 ["Due process requires the prosecution to shoulder the burden of proving each element of a sentence enhancement beyond a reasonable doubt."].) "This cardinal principle of criminal jurisprudence" (*Tenner*, at p. 566) is so

fundamental to the American system of justice that criminal defendants are always "afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts." (*United States v. Powell* (1984) 469 U.S. 57, 67.) Here, we are concerned with whether the evidence was sufficient to support the court's conclusion that the prior evading conviction (Veh. Code, § 2800.3, subd. (a)) qualified as a strike. (*People v. McGee* (2006) 38 Cal.4th 682, 706.)

1.1. Standard of Review

In assessing the sufficiency of the evidence, we review the entire record to determine whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Ibid*.) In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Deference is not abdication, however, and substantial evidence is not synonymous with *any* evidence. " 'A decision supported by a mere scintilla of evidence need not be affirmed on appeal.' [Citation.] Although substantial evidence may consist of inferences, those inferences must be products of logic and reason and must be based on the evidence." (*In re James R.* (2009) 176 Cal.App.4th 129, 135.)

1.2. The evidence does not establish that defendant personally inflicted great bodily injury on a non-accomplice.

Under California's Three Strikes law, a defendant's sentence is doubled upon proof that he has been previously convicted of a "strike" offense—a violent felony as defined in Penal Code section 667.5, subdivision (c), or a serious felony as defined in Penal Code section 1192.7, subdivision (c). (Pen. Code, §§ 667, subd. (f)(1), 1170.12, subd. (d)(1).) Although a violation of Vehicle Code section 2800.3 is not among the crimes listed in those statutes, it nevertheless qualifies as a serious felony within the meaning of the Three Strikes law, when it "involve[s] the personal infliction of great bodily injury on any person, other than an accomplice … ." (Pen. Code, § 1192.8, subd. (a).) Since not every evading conviction qualifies, the prosecution "had the burden to prove each of the elements of this definition beyond a reasonable doubt. [Citation.]" (*People v. Valenzuela* (2010) 191 Cal.App.4th 316, 320 (*Valenzuela*); *People v. Henley* (1999) 72 Cal.App.4th 555, 559.) Here, the People properly concede that the prosecution did not produce sufficient evidence to establish that defendant personally inflicted great bodily injury on a non-accomplice.

According to the certified minute orders in case no. KA043325, in 1999, defendant pled no contest to count 6 of the information, described as "2800.3 VC." As relevant here, the elements of Vehicle Code section 2800.3, subdivision (a), are:

- A peace officer in a vehicle was pursuing the defendant, who was also driving a vehicle;
- The defendant intended to evade the peace officer;

- While driving, the defendant willfully fled from or tried to elude the pursuing peace officer;
- The defendant's attempt to flee from or elude the pursuing peace officer proximately caused serious bodily injury to someone else.

(Veh. Code, §§ 2800.3, subd. (a), 2800.1, subd. (a); see CALCRIM No. 2180.) By pleading no contest to this charge, defendant admitted these elements—namely, that his unlawful driving proximately caused another person to suffer serious bodily injury. (*People v. Learnard* (2016) 4 Cal.App.5th 1117, 1122; *People v. Guerrero* (1988) 44 Cal.3d 343, 355 [fact of prior conviction establishes only that defendant committed the least adjudicated elements of the offense].)

As we explain below, however, proximately causing great bodily injury to "someone else" is not the same as personally inflicting great bodily injury on a non-accomplice. Accordingly, to prove that the prior conviction was a strike offense, the prosecution had to do more than establish defendant admitted the least adjudicated elements of Vehicle Code section 2800.3. (See *People v. Eslava* (2016) 5 Cal.App.5th 498, 515–517 (*Eslava*), review granted Feb. 15, 2017, S239061 [jury waiver and stipulation to factual basis for plea do not establish or waive jury determination of non-elemental fact].) We conclude the evidence was insufficient to prove that defendant personally inflicted whatever injuries were sustained by the victim in this case, whomever that may have been.

First, there is no substantial evidence that defendant injured someone other than an accomplice in his crime of evading the police. The minute orders do not reveal the victim's identity or status, and no evidence was submitted showing that the victim

was an innocent bystander or motorist.[5] Therefore, the prosecution did not prove defendant injured a non-accomplice. (See *People v. Henley*, *supra*, 72 Cal.App.4th at pp. 561–562 [prosecutor failed to prove injured party was not an accomplice where neither the plea transcript nor the complaint mentioned the injured party's status, and the prosecutor did not present any evidence to prove that the injured party was not an accomplice].)

Second, there is no substantial evidence that defendant personally inflicted the injuries. As discussed, defendant admitted that he proximately caused great bodily injury—but " '[p]roximately causing an injury is clearly different from personally inflicting an injury.' [Citation.] 'To "personally inflict" an injury is to directly cause an injury, not just to proximately cause it.' " (*People v. Bland* (2002) 28 Cal.4th 313, 337.) " 'We think it obvious that an individual can and often does proximately cause injury without personally inflicting that injury.' " (*Ibid.*, emphasis removed; see *Valenzuela*, *supra*, 191 Cal.App.4th at p. 321 ["proof a defendant proximately caused great bodily injury does not constitute proof the defendant personally inflicted such injury"]; *People v. Slough* (2017) 11 Cal.App.5th 419 [while heroin sale proximately caused overdose victim's death, it was not sufficient to establish personal infliction].)

The record before us does not disclose how the victim in this case was injured—or what injured him or her. As such,

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[5] As discussed, the minute orders were the only documents from the record of conviction presented below. (See *Eslava*, *supra*, 5 Cal.App.5th at p. 508, fn. 5 [listing documents comprising record of conviction]; *People v. Martinez* (2000) 22 Cal.4th 106, 117 [rap sheet inadmissible to prove nature or circumstances of prior crime].)

there is no factual basis to support a conclusion that defendant directly caused whatever injuries the victim may have suffered. (See *Valenzuela*, *supra*, 191 Cal.App.4th at pp. 322–323 ["While the bare facts of his plea establish that defendant's reckless driving was a volitional act, …we have no facts describing the cause of the victims' injuries. It could be that the victims were injured when another driver swerved to avoid defendant and that driver's vehicle collided with the victims. In such a case, the other driver's volitional act of swerving out of defendant's path would be the direct cause of the victims' injuries, though defendant's reckless driving would still be the proximate cause."]; *People v. Wilson* (2013) 219 Cal.App.4th 500, 513 [elements of gross vehicular manslaughter insufficient to establish personal infliction]; *People v. Rodriguez* (1999) 69 Cal.App.4th 341 [proximately causing serious bodily injury while resisting a police officer insufficient to establish personal infliction].)

Absent additional facts about the crime, substantial evidence does not support the trial court's determination that defendant's violation of Vehicle Code section 2800.3 was a serious felony within the meaning of Penal Code section 1192.8, subdivision (a).[6]

2. Proceedings on Remand

As relevant to the proceedings on remand, we have already determined that the elements of defendant's prior evading conviction do not establish that he personally inflicted great

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[6] Because we conclude reversal is required for insufficient evidence, we need not resolve either defendant's additional argument that the strike finding violated his Sixth Amendment rights or the People's contention that defendant waived that issue.

bodily injury on a person other than an accomplice, and we agree with the parties that the current state of the law requires us to let the People try again. (*Eslava*, *supra*, 5 Cal.App.5th at pp. 519–520 & fn. 13; *People v. Barragan* (2004) 32 Cal.4th 236.) The state and federal high courts appear to disagree, however, about whether defendant has a Sixth Amendment right to a jury determination of non-elemental facts like those at issue here.

The California Supreme Court has previously determined that a sentencing court may make strike and serious felony determinations based on the entire record of conviction in the prior case. (See, e.g., *People v. Woodell* (1998) 17 Cal.4th 448, 454.) In addition, where the alleged strike prior rests on a plea of guilty or no contest, the trial court may examine the record of conviction to determine whether the crime "realistically may have been based on conduct" that does not qualify as a strike and serious felony under California law. (*People v. McGee* (2006) 38 Cal.4th 682, 706.)

Under the federal Constitution, however, "only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction." (*Mathis v. United States* (2016) 579 U.S. ___ [136 S.Ct. 2243, 2252], citing *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; see also *Descamps*, *supra*, 133 S.Ct. at p. 2288 ["Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"].) *Mathis* and *Descamps* suggest that insofar as California's procedure for determining whether a prior conviction qualifies as a strike involves judicial fact-finding beyond the elements of the offense, it violates the Sixth Amendment. (*Descamps*, at p. 2288; see, e.g., *Eslava*,

supra, 5 Cal.App.5th at pp. 514–521; *People v. Navarette* (2016) 4 Cal.App.5th 829, 855; *People v. McCaw* (2016) 1 Cal.App.5th 471, 484, review granted Oct. 19, 2016, S236618; *People v. Denard* (2015) 242 Cal.App.4th 1012, 1030–1034; *People v. Marin* (2015) 240 Cal.App.4th 1344, 1348–1349, 1362–1364; *People v. Saez* (2015) 237 Cal.App.4th 1177, 1196–1197, 1205–1208; *People v. Wilson*, *supra*, 219 Cal.App.4th at p. 515.)

On February 17, 2016, the California Supreme Court granted review in *People v. Gallardo*, S231260 (*Gallardo*), which will reconcile these clashing principles by resolving the following issue: "Was the trial court's decision that defendant's prior conviction constituted a strike incompatible with *Descamps v. U.S.* (2013) 570 U.S. __ [133 S.Ct. 2276] because the trial court relied on judicial fact-finding beyond the elements of the actual prior conviction?" *Gallardo* was argued and submitted on October 2, 2017.

As such, there is uncertainty about which evidentiary issues must be tried to a jury under the Sixth Amendment in California. Because we do not know what evidence the People may ultimately produce to prove the strike allegation, we offer no opinion on what matters a jury must resolve. The trial court will be in the best position to address the issue in light of the specific elections by the People on remand. Should the California Supreme Court issue an opinion in *Gallardo* before the completion of the new priors trial, the trial court should follow *Gallardo*.

DISPOSITION

The judgment is reversed to the extent it is based on a finding that defendant suffered a prior serious felony conviction. The sentence is vacated, and the matter is remanded for further proceedings. The People shall have 30 days after the remittitur is filed to give notice of their intent to retry the strike allegation that defendant was previously convicted of violating Vehicle Code section 2800.3 and that he personally inflicted great bodily injury on a non-accomplice in the commission of that offense. If the People give such notice, the trial court shall hold a new priors trial limited to those issues and consistent with the views expressed in this opinion. If, before those proceedings are complete, the California Supreme Court issues an opinion in *Gallardo*, S231260, the court should conduct the proceedings in accordance with *Gallardo*. If the People fail to give notice, fail to prove that defendant was convicted of violating Vehicle Code section 2800.3, or fail to prove that the conviction was for a serious felony, the court shall enter a not true finding and shall resentence defendant without application of the Three Strikes law. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR: EDMON, P. J.

STONE, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.