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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ISAIAH CALVIN GUERRERO, Defendant and Appellant.	B285682 (Los Angeles County Super. Ct. No. VA144657)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael A. Cowell, Judge. Affirmed.

Joseph R. Escobosa, 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, Paul M. Roadarmel, Jr., and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

Isaiah Calvin Guerrero (appellant) was convicted of first degree burglary (Pen. Code, § 459).[1] He admitted a prior conviction for assault with a deadly weapon causing great bodily injury (§§ 459, 12022.7), a serious and/or violent felony within the meaning of the "Three Strikes" law (§§ 667, subd. (d), 1170.12, subds. (a)-(d)). Also, he admitted three prior prison terms within the meaning of section 667.5, subdivision (b). He was sentenced to 17 years in state prison, calculated as follows: the high term of six years for first degree burglary, doubled to 12 years pursuant to section 1170.12, and an additional five years for a serious felony enhancement pursuant to section 667, subdivision (a)(1). The prior prison term enhancements were stricken.

On appeal, appellant contends: (1) the trial court erroneously admitted a prior uncharged theft pursuant to Evidence Code section 1101, subdivision (b), and (2) the trial court erred when it imposed the five-year enhancement because even though appellant admitted his prior strike conviction, he did not admit it was for a serious felony.

We find no error and affirm.

FACTS

The prosecutor put on evidence of an uncharged theft as well as the charged offense.

Regarding the uncharged theft, the evidence showed that on April 26, 2017, appellant entered his former place of employment (a McDonald's restaurant), removed money from a safe, and absconded.

As for the charged offense, the evidence showed that on April 30, 2017, the victim woke up at 4:00 a.m. and found

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

appellant in her kitchen. Drawers containing silver, tools and other items had been opened. She screamed at him, and he left through the back door. She called 911. Appellant was subsequently detained and the victim identified him at a field show up.

DISCUSSION

I. Evidence of the Uncharged Theft.

Appellant posits that the uncharged theft was inadmissible under Evidence Code section 1101, subdivision (b) because it was not sufficiently similar to the charged offense to prove common design or plan and, as a result, could not be used to prove intent. In the alternative, he contends the uncharged theft was inadmissible because it was unduly prejudicial pursuant to Evidence Code section 352.

A. Relevant Proceedings.

The prosecution filed a motion to admit the evidence of appellant's uncharged theft at McDonald's pursuant to Evidence Code section 1101, subdivision (b). According to the motion, the uncharged theft was admissible to prove appellant's larcenous intent when he entered the victim's house and committed the charged offense.

At the hearing, the trial court stated that it was "not inclined to allow the one that alleges that he entered" McDonald's because there was not a "sufficient factual basis." The trial court commented that the "one who wakes up and sees him in her house, however, is on point" and asked defense counsel if she wished to be heard.[2] Defense counsel replied, "No, your Honor. That would be our position."

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[2] The trial court mistakenly believed that it was being asked to consider admitting two prior uncharged thefts. Moreover, it

The following discussion ensued:

"[PROSECUTOR]: Your Honor, I believe it was just the one incident. There was the charged offense.

"[DEFENSE COUNSEL]: The charged offense is the entry. I know that [the former prosecutor] and myself discussed whether or not another 459 conduct would be in, but due to the dates of it I believe that we determined that that one would not be something that [the] People would be introducing. [¶] So I believe that what the final discussion was—[3]

"[TRIAL COURT]: That these two are to be admissible.[4]

"[DEFENSE COUNSEL]: Well, one of them is the actual case at hand.

"[TRIAL COURT]: I see.

"[DEFENSE COUNSEL]: And then the McDonald's matter, your Honor, is the 1101.

"[TRIAL COURT]: All right. [¶] And that's an agreement that you had with the prosecutor?

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mistakenly believed that the charged offense was a prior uncharged theft.

3 We construe defense counsel's statement to mean that the former prosecutor was originally contemplating using two prior uncharged thefts as Evidence Code section 1101, subdivision (b) evidence, namely the McDonald's incident and a second incident that is not identified in the appellate record. The former prosecutor and defense counsel agreed that the McDonald's incident would be admitted into evidence but that the second incident would not be admitted into evidence.

4 Again, the trial court was thinking the charged offense was a prior uncharged theft the prosecutor was seeking to introduce under Evidence Code section 1101, subdivision (b).

"[DEFENSE COUNSEL]: That is what the prosecutor and I discussed.

"[TRIAL COURT]: All right. The Court will allow it then. [¶] I'm not going to discuss it during voir dire, however. [¶] And I take it there's going to be a motion to bifurcate the prior?

"[DEFENSE COUNSEL]: Yes, your Honor.

"[TRIAL COURT]: All right. [¶] Granted."

Later, before the testimony of the victim in the uncharged theft, the trial court indicated that it wanted a jury instruction that informed the jury that it "may only consider [the testimony] for the purpose of establishing whether [appellant] had the requisite intent."

Defense counsel adverted to CALCRIM No. 375, which is entitled "Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc." The trial court stated, "Yes. Evidence of uncharged crimes. Right. I will edit this. [¶] And the only reason it's coming in for is intent right? Because the circumstances of the crime are different. It wasn't a residence and so on." Defense counsel replied, "Yes. It's just intent."

The victim in the uncharged theft then testified. Following her testimony, the trial court admonished the jury: "[Y]ou're instructed to consider this for a limited purpose only. And that is to ascertain whether in this case, involving the charge of residential burglary, whether [appellant] had the requisite intent of committing theft upon entering the house of [the victim in the charged offense]. That's the only reason for which you may consider the testimony of this witness who's just been excused."

Subsequently, during jury instruction, the trial court read an edited version of CALCRIM No. 375. In part, the instruction provided: "If you decide the defendant committed the uncharged

offense, you may, but are not required to, consider that evidence for the limited purpose of deciding whether [appellant] acted with the intent to commit the crime of theft in this case. [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offense and the charged offense. Do not consider this evidence for any other purpose except for the limited purpose of determining the defendant's intent. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit a crime. [¶] If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of burglary in this case. [¶] The People must still prove the charge beyond a reasonable doubt."

B. Analysis.

Appellant's claim of error lacks merit. The trial court granted the prosecutor's motion to admit the uncharged theft after being informed the parties had agreed it would be admissible to prove intent. Moreover, defense counsel did not object to the uncharged theft evidence. Rather, she repeatedly confirmed her agreement by clarifying the evidence would only go to intent, and by adverting to CALCRIM No. 375 as the appropriate limiting instruction. Under these circumstances, any claim of error has been invited and/or forfeited. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403 [when a party induces error, he is estopped from asserting it on appeal]; *People v. Partida* (2005) 37 Cal.4th 428, 431 ["A defendant may not argue on appeal that the [trial court] should have excluded the evidence for a reason *not* asserted at trial"].)

II. The Five-Year Enhancement.

Appellant contends the five-year enhancement was imposed in excess of the trial court's jurisdiction because he did not admit his prior was a serious felony.

A. Relevant Proceedings.

In an amended information, the People alleged that appellant suffered a prior conviction for assault with a deadly weapon inflicting great bodily harm (§§ 245, subd. (a)(1), 12022.7). It was further alleged that the prior conviction was a serious and/or violent felony within the meaning of section 667, subdivision (d) and section 1170.12, and that it was a serious felony within the meaning of section 667, subdivision (a)(1). In a bifurcated proceeding, appellant waived his right to a jury trial on the prior allegations. The following discussion followed:

"[TRIAL COURT]: Do you wish to admit the prior or do you wish to have a court trial on the prior?

"[APPELLANT]: I'll admit the prior.

"[TRIAL COURT]: Again, sir, you have a right to a trial on the prior. You have a right to confront and cross-examine witnesses. You have a right to present a defense of your own. [¶] And most importantly, you have a privilege against self-incrimination. No one can force you to say anything that would result in that prior being found to be true. [¶] Do you understand these rights, sir?

"[APPELLANT]: Yes, your Honor.

"[TRIAL COURT]: And do you wish to give them up in order to admit the prior alleged in this case, specifically, the allegation that you sustained a strike conviction in case number BA389047, alleging a violation of section 245(a)(1) with a great bodily injury enhancement under [section] 12022.7[], that

conviction occurring April 13th, 2012, in Los Angeles. [¶] Do you admit that to be true, sir?

"[APPELLANT]: Yes, your Honor.

"[TRIAL COURT]: It's further alleged within the meaning of [section] 667.5[, subdivision] (b) that you sustained a conviction in addition to that case. Also in case number BA121287 and VA115423. In all three of those cases [you suffered a prior prison term] within the meaning of section 667.5[, subdivision] (b)[.] [D]o you admit those priors to be true?

"[APPELLANT]: Are those the same charges?

"[TRIAL COURT]: One would be the same prior. [¶] Those priors could serve to add one additional year to your sentence. [¶] The strike prior serves to possibly double the sentence. [¶] Do you understand that?

"[APPELLANT]: Yes, your Honor.

"[TRIAL COURT]: Do you admit them all to be true?

"[APPELLANT]: Yes, your Honor."

Defense counsel joined in the waivers and concurred in the admission.

The trial court then stated: "The [trial court] is satisfied that [appellant] has knowingly, understandingly, and intelligently waived his right to trial by jury, his privilege against self-incrimination, and his right to confront and cross-examine witnesses with respect to the bifurcated priors and finds those priors to be true accordingly."

At sentencing, the trial court indicated that the base term of six years was doubled because of appellant's admission of the strike prior. The trial court then commented: "And the [trial court] is mandated to impose an additional five years because of

the [section] 667[, subdivision (a)] prior." There was no objection from the defense.

B. Analysis.

There is no dispute that section 667, subdivision (a)(1) supports a five-year enhancement. The only issue raised is whether appellant's admission was sufficient to allow the enhancement to be imposed.

Appellant states: "At sentencing, appellant admitted his prior strike within the meaning of Penal Code section 667, subdivisions (b)-(i). . . . However, appellant did not specifically plead to the serious and/or violent felony prior within the meaning of Penal Code section 667, subdivision (a). [¶] The trial court made no specific finding as to the prior serious and/or violent felony for purposes of the enhancement. A sentence imposed upon a charge not found upon a plea of guilty . . . nor a finding of guilt[] is an unauthorized sentence and is in excess of jurisdiction, which is not waived by [an appellant's] failure to object in the trial court."

This argument is unavailing.

"[A] defendant's admission of an alleged enhancement is valid even if it does not include specific admissions of every factual element required to establish the enhancement." (*People v. French* (2008) 43 Cal.4th 36, 50 (*French*).) A prior strike conviction for purposes of section 667, subdivision (a)(1) was alleged in the amended information. It was the same prior strike conviction that supported the allegations under section 667, subdivision (d) and section 1170.12. Appellant admitted that he suffered a prior strike conviction for violating section 245, subdivision (a)(1) and inflicting great bodily injury for purposes of section 12022.7. That was sufficient under *French* to stand as an

admission of the allegation pursuant to section 667, subdivision (a)(1). There is no claim the admission fails because it was neither knowing nor intelligent. Thus, appellant cannot establish the absence of an admission supporting the imposed five-year enhancement.

Appellant suggests that *French* is nullified by section 969f. This suggestion does not bear out.

Section 969f provides, inter alia: "Whenever a defendant has committed a serious felony as defined in subdivision (c) of [s]ection 1192.7, the facts that make the crime constitute a serious felony may be charged in the accusatory pleading. . . . This charge, if made, shall be added to and be a part of the count or each of the counts of the accusatory pleading which charged the offense." Case law holds that once a prosecutor files a serious felony allegation, "it becomes *mandatory for* (a) the trier of fact to make a finding on the allegation (if the defendant pleads not guilty) or (b) the defendant to admit or deny the allegation (if he or she pleads guilty)." *(People v. Leslie* (1996) 47 Ca1.App.4th 198, 204.)

Tacitly, appellant suggests that section 969f requires a defendant to specifically admit that a prior strike conviction is a serious felony. But section 969f was "enacted in order to 'prequalify a crime as a serious felony' for purposes of the three strikes law. [Citation.]" (*People v. Bueno* (2006) 143 Cal.App.4th 1503, 1509.) Consequently, section 969f achieves the following goal: "[T]he serious felony nature of the offense will become an explicit part of the record of conviction, leaving no room for confusion if and when the issue becomes relevant to the sentence for a subsequent felony." (*People v. Delgado* (2008) 43 Cal.4th 1059, 1072.) On its face, section 969f applies to charged offenses,

not prior strike convictions. Accordingly, there is no basis for us to depart from *French*.

All other issues are moot.

DISPOSITION

The judgment is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ