Filed 3/14/18 P. v. Richardson CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>CHRISTOPHER RICHARDSON,<br><br>Defendant and Appellant. | B281119<br><br>(Los Angeles County Super. Ct. No. BA440131) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Anne H. Egerton, Judge. Affirmed.

Brad Kaiserman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Christopher Richardson appeals his robbery conviction in count 1, challenging the sufficiency of the evidence. Defendant contends that the trial court gave an erroneous response to a jury question, that the advisements required prior to accepting his admission of prior convictions were incomplete, and that defense counsel rendered constitutionally inadequate assistance. We find no merit to defendant's contentions, and affirm the judgment.

## BACKGROUND

Defendant was charged in an amended information with two counts of second degree robbery as defined in Penal Code sections 211 and 212.5, subdivision (c).[1] As to both counts, it was alleged that the crimes were gang related. (§ 186.22, subd. (b)(1)(c).) As to count 2, it was alleged that defendant personally used a firearm within the meaning of section 12022.53, subdivision (b). In addition, it was alleged that defendant had suffered one prior serious or violent felony conviction within the meaning of the "Three Strikes" Law (§§ 667, subd. (d), 1170.12, subd. (b)), and section 667, subdivision (a)(1); and that he had suffered two felony prison prior convictions within the meaning of section 667.5, subdivision (b).

A jury found defendant guilty of both robberies, but found the firearm allegation not true and deadlocked on the gang allegation. Defendant waived his right to a trial on the three prior convictions and admitted each of them. The trial court denied defendant's *Romero*[2] motion to strike the prior strike

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

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

conviction, but struck the prior prison term allegations. On February 16, 2017, the defendant was sentenced to a total term of 13 years in prison, comprised of the following: the middle term of three years as to count 1, doubled as a second strike, enhanced by five years under section 667, subdivision (a)(1); and two consecutive years as to count 2 (one-third the middle term doubled as a second strike). The court imposed mandatory fines and fees, and awarded 588 days of combined presentence custody credit.

Defendant filed a timely notice of appeal from the judgment.

**Prosecution evidence (count 1)**[3]

Brenda Gonzalez (Gonzalez), supervisor at a Warehouse Shoe Sale store on Manchester Avenue, testified that she was in the store's office on September 6, 2015, when she heard two men arguing. She went to the area of the front door, where she saw a man she identified as defendant screaming at Emmanuel, a store security guard. Three other men she had seen as she came out of the office were gone by the time she approached defendant and Emmanuel. Gonzalez asked defendant to leave, and from inside the store, she watched him get into the driver's side of a gray SUV. She stayed inside the store for her safety and that of others, including children in the store with their parents, and five other employees. Another security guard, Jahlyn Bailous (Bailous), told her that before leaving, defendant asked if Bailous was ready to die for his shoes. Both Bailous and Gonzalez testified that defendant had "83" tattooed on his face.

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[3] Since defendant has raised no issue regarding his conviction in count 2, we omit any reference to the facts of that robbery.

Bailous testified that he was positioned at the front door on September 6, 2015, when three men entered, walked around looking at merchandise. He saw one of them pick up two pair of high priced Jordan shoes. Bailous became suspicious, so he and another guard watched the men. He then saw defendant enter the store and begin conversing with the three others. Bailous heard the other guard ask the group to leave. Just before leaving, defendant walked in front of Bailous and the other guard, with the others in his group standing behind him, and asked whether Bailous took his job seriously and, "Are you willing to die for some shoes? What would you do if I took those shoes off your feet?" Later, Bailous told Gonzalez what defendant had said. Bailous feared for his safety and that of anyone else in the store, and was afraid that defendant would come back. Bailous did not wear the $200 Jordan Retro 5 shoes again after that day.

Two days later, shortly after the morning opening, Gonzalez and sales associate Carlos Pedro (Pedro) were working alone in the store. No security guard was on duty that early. Pedro was watching over the door while Gonzalez worked the register.

Defendant entered the store with three other men, and after grabbing seven boxes of shoes from the area where Jordan shoes were kept, the men walked toward the exit. When Pedro moved to try to stop the men, Gonzalez told him to step out of the way. Gonzalez explained that after defendant entered the store she recognized him from two days before, and knowing that he had previously threatened someone, she was afraid for both Pedro's and her own safety, so she told Pedro just to stay out of their way. One of the men walked toward Gonzalez, staring at her and holding a shoe box in a way that she thought he was going to hit her with it. She moved out of his way. Gonzalez did

not recall at trial which of the men it was, but shortly after the incident she told police that it was the one with "83" tattooed on his face. As defendant left he told Pedro, "This is West Side Eight Trey Hoover," and "Catch you later." Pedro had seen the "83" tattoo under defendant's left eye. Pedro recognized that defendant was a gang member.

As the men left they walked outside toward the back of the store. Neither Gonzalez nor Pedro went outside to identify the car or license plate. Gonzalez explained that store policy permitted them to step a few feet outside to look, but she was too afraid.

Los Angeles Police Department (LAPD) Officer Bryan Zepeda testified that when he spoke to Gonzalez, an hour or so after the incident, she said that one of the men involved in both incidents had "83" tattooed on his left cheek. She also told him that on September 8, the same man approached her while holding a box of shoes with a clenched fist, put his chin in the air, and stared at her for five seconds, as if he was preparing to strike her.

Lead investigator, Sergeant Enrique Atillano, testified that he met with Pedro on September 10, 2015, and although Pedro claimed to be unafraid, Sergeant Atillano observed him to be very young and hesitant to provide information. Sergeant Atillano spoke to Pedro for some time to try and relax him, before Pedro finally shared that he feared for his life and the safety of his coworkers, as he believed that defendant belonged to a violent street gang operating in the area. Pedro said he was afraid they would come back, because one of the men said, "We'll catch you later."

In a later search of a car registered to defendant and another car defendant had been seen driving, officers found boxes

containing Jordan, Nike and Adidas shoes that appeared to be brand new.

**Defense evidence**

The defense presented only the testimony of a gang expert.

## DISCUSSION

### I. Substantial evidence of victim's fear

Defendant contends that his count 1 conviction must be reversed because it was unsupported by substantial evidence that the theft of the shoes was accomplished by force or fear.

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.) "The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "An appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 396.) "[B]ecause 'we *must* begin with the presumption that the evidence . . . *was* sufficient,' it is defendant, as the appellant, who 'bears the burden of convincing us otherwise.' [Citation.]" (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1430.) Reversal on a substantial evidence ground "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Defendant begins his argument with the definition of robbery as "the felonious taking of personal property in the

possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) In addition, defendant notes that to constitute robbery and not mere theft, "the force or fear must be used against a person who has a possessory interest in the stolen property in order to transform the theft into a robbery. [Citation.]" (*People v. Jenkins* (2006) 140 Cal.App.4th 805, 811.) An employee of a store would have a possessory interest in the store's merchandise, whereas, for example, a visitor to the store would not. (*People v. Nguyen* (2000) 24 Cal.4th 756, 764.) Defendant then observes that the threat he made two days earlier was made personally to Bailous and concerned Bailous's own shoes, not the store's merchandise. Defendant also notes that Bailous was not present during the robbery, and although Gonzalez was present on both occasions, she did not personally hear the threat he made to Bailous. From these facts and authorities, defendant concludes that the September 8, 2015, theft was not accomplished by force or fear because there was "(1) [a] two day time lapse between the threat and the theft; (2) . . . the threat was not directed at, nor even heard by, anyone who was a victim in the robbery; and (3) . . . the threat did not pertain to the items taken during the theft."

Defendant cites no case that holds that there must be a direct threat made to the person with the possessory interest at the time the perpetrator uses fear to carry away property. "To establish a robbery was committed by means of fear, the prosecution 'must present evidence ". . . that the victim was in fact afraid, and that such fear allowed the crime to be accomplished."' [Citations.]" (*People v. Morehead* (2011) 191 Cal.App.4th 765, 772.) A robbery may consist of the use of fear either to steal property or to prevent a store employee from retaking stolen property. (*People v. Anderson* (2011) 51 Cal.4th

989, 994; *People v. Estes* (1983) 147 Cal.App.3d 23, 27-28.) However, the victim's fear need not be the result of an express threat. (*Morehead, supra*, at p. 775; *People v. Flynn* (2000) 77 Cal.App.4th 766, 771.) Further, the evidence need not show that the robber intended "to cause the victim to experience fear." (*Anderson, supra*, at p. 995.) Even an accidental act of force or intimidation by which the taking or carrying away is accomplished is sufficient, so long as it was motivated by the intent to steal. (*Id.* at pp. 994-995, 999.) Thus, the focus is not the cause of the fear; it is "the willful use of fear to retain property immediately after it has been taken from the owner [that] constitutes robbery. So long as the perpetrator uses the victim's fear to accomplish the retention of the property, it makes no difference whether the fear is generated by the perpetrator's specific words or actions designed to frighten, or by the circumstances surrounding the taking itself." (*Flynn, supra*, at p. 772.)

It follows that the prosecution was not required to prove that Gonzalez's fear was caused by a direct threat to her or to the store's merchandise. There was ample evidence that Gonzalez was actually afraid, that defendant knew she was afraid, and that he used her fear to enable him to walk out of the store with stolen shoes without interference. When Gonzalez was in the store two days before the robbery, she observed defendant aggressively yelling at a store security guard and saw defendant's visible gang related tattoo. Later she was given information about the threat to Bailous. Moreover, contrary to the suggestion that defendant did not directly cause Gonzalez to be afraid at the time of the September 8, 2015 theft, substantial evidence showed otherwise. Defendant had seen Gonzalez in the store on September 6, as it was Gonzalez who asked him to leave. Defendant returned on the day of the theft, accompanied by three

other men, and as defendant left the store he walked directly toward Gonzalez openly holding a box of shoes, with his chin in the air and his fist clenched, staring at her for a full five seconds. Defendant then shouted, "West Side Hoovers," before leaving the store with the shoes. As soon as they left, Pedro told Gonzalez that one of the men had "gang-banged on him" by mentioning the Hoovers gang. As a result of all of these acts, Gonzalez was in fear of defendant and his companions. Her fear then stopped her from interfering with the men's departure from the store with the shoes.

Defendant asserts that the menacing behavior with the shoebox while carrying away property cannot be considered substantial evidence because it was established with conflicting testimony: Gonzalez testified that it was done by one of the other men; then she testified that she did not recall whether it was defendant; and Officer Zepeda testified that Gonzalez told him an hour after the robbery that it was done by the man with the "83" tattoo who said, "West Side Hoovers." Defendant further asserts that a jury question about whether the prior threat could be used to establish fear, indicated that the jurors did not rely on the evidence of the menacing shoebox behavior. The law is to the contrary. Conflicts in evidence do not render the evidence insubstantial; instead they present a factual issue for the jury to resolve. We accept the jury's resolution. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Further, we may not assume that the jury rejected evidence favorable to the prosecution; instead, we must presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft, supra*, 23 Cal.4th at p. 1053.)

In sum, there is no merit to defendant's claim that the prior incident could not have contributed to Gonzalez's fear on the day of the robbery or that defendant did not use Gonzalez's fear to

carry away the stolen property. Substantial evidence supported defendant's conviction of robbery in count 1.

**II. Jury question**

Defendant contends that the trial court's response to the following question posed by the jury was erroneous: "Please clarify: . . . 9/6/15 and 9/8/15 . . . should the threat from 9/6 be considered for count 1 decision? What does the law say?" With the agreement of both counsel, the trial court responded in writing, "Please refer to Instruction 1600."

As the discussion with counsel was not reported, the trial court summarized it for record after the verdicts were read. The court noted that the jury question and the court's research were discussed with counsel, and that its research led to the conclusion that "'prior threats or prior conduct can be considered for the reasonable and actual fear of the victim.'" The court stated that despite its inclination to give the jury "something more," both counsel "really wanted" the court simply to refer back to CALCRIM No. 1600. The court concluded that counsel stipulated to the response given. On appeal, defendant contends that the trial court should have clarified that "the previous threat could not be used to support the robbery," by answering "the jury's question with a simple 'No.'" Defendant also contends that if the issue is deemed forfeited by defense counsel's agreement to the response, counsel rendered constitutionally ineffective assistance.

The Sixth Amendment right to assistance of counsel includes the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-674; see also Cal. Const., art. I, § 15.) It is defendant's burden to demonstrate that trial counsel was inadequate and that prejudice resulted. (*People v. Vines* (2011) 51 Cal.4th 830, 875-876.) Prejudice is shown by "a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington, supra*, at p. 694.)

CALCRIM No. 1600 correctly states the elements of robbery, and "fear" has no technical meaning peculiar to the law. (*People v. Morehead, supra*, 191 Cal.App.4th at p. 775.) The victim's fear should be determined from all the circumstances surrounding the taking. (*Id*. at pp. 774-775.) Defendant has cited no authority for the proposition that knowing about a prior threat is not one of the circumstances that the jury may consider as evidence of the victim's fear. Nor has defendant cited any authority for the proposition that any fear caused by the defendant two days before the actual taking may not be considered. In the last section we rejected defendant's suggestion that the two-day-old events could not be considered in determining whether there was substantial evidence of Gonzalez's fear. It therefore follows that defendant's suggested response would have been erroneous. Counsel does not render inadequate representation by failing to request an erroneous instruction. (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836.)

Not only was there no showing of counsel error, defendant has not demonstrated prejudice. Indeed there was substantial evidence, without considering the events of September 6, 2015, to support the jury's finding that defendant used fear on the day of the robbery to carry away the stolen property. Defendant's gang related appearance, his mention of his gang, his three accomplices, his menacing look, clenched fist, lengthy stare and his raised chin as he walked out of the store with stolen merchandise, all caused Gonzalez to fear him and to be afraid to interfere or even look outside for a license plate. We conclude that under such circumstances, there was no reasonable probability of a different result.

## III. *Yurko*[4] error

Defendant contends that the trial court's findings regarding prior convictions must be reversed because his admissions were not knowing and voluntary.

"[B]efore accepting a criminal defendant's admission of a prior conviction, the trial court must advise the defendant and obtain waivers of (1) the right to a trial to determine the fact of the prior conviction, (2) the right to remain silent, and (3) the right to confront adverse witnesses. (*In re Yurko* [*, supra*,] 10 Cal.3d 857, 863.)" (*People v. Mosby* (2004) 33 Cal.4th 353, 356 (*Mosby*).) "Proper advisement and waivers of these rights in the record establish a defendant's voluntary and intelligent admission of the prior conviction. [Citations.]" (*Id*. at p. 356.) In addition, "'as a judicially declared rule of criminal procedure' . . . an accused, before admitting a prior conviction allegation, must be advised of the precise increase in the prison term that might be imposed, the effect on parole eligibility, and the possibility of being adjudged a habitual criminal. [Citation.]" (*People v. Cross* (2015) 61 Cal.4th 164, 170-171, citing *In re Yurko, supra*, at p. 864.)

Here, defendant was twice informed of his right to a trial in which the prosecutor would be required to produce evidence. While the jury was deliberating, the trial court informed defendant that he had the right to have the jury determine his priors, and the evidence would consist of court records, finger prints, and photographs, or he could have a court trial in which the convictions would also have to be proven beyond a reasonable doubt. Two weeks later, at the time of the admissions, the prosecutor informed defendant that he had the right to a trial at which she would produce documents to prove the prior

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4 *In re Yurko* (1974) 10 Cal.3d 857.

convictions, and defense counsel would be permitted to question any witness and attack the credibility of the documents. The right to remain silent was omitted. Nor was defendant told what additional punishment could result from the admission of the prior strike conviction.

As not all the required advisements were given at the time of the admission, we must examine the whole record "to assess whether the defendant's admission of the prior conviction was intelligent and voluntary in light of the totality of circumstances. [Citation.]" (*Mosby, supra*, 33 Cal.4th at p. 361.) Reversal is not required when "a defendant admits a prior conviction after being advised of and waiving only the right to trial" if "the totality of circumstances surrounding the admission" supports the conclusion that the admission was voluntary and intelligent. (*Id*. at p. at p. 356.) "'[A] defendant's prior experience with the criminal justice system' is . . . 'relevant to the question [of] whether he knowingly waived constitutional rights.' [Citation.] That is so because previous experience in the criminal justice system is relevant to a recidivist's '"knowledge and sophistication regarding his [legal] rights."' [Citations.]" (*Id*. at p. 365, quoting *Parke v. Raley* (1992) 506 U.S. 20, 36-37, fn. omitted.)

Here, the prosecutor's statement that defendant had the right to a trial at which she would produce evidence to prove the prior convictions effectively informed defendant that he was not required to admit the prior convictions. Further, as defendant was represented by counsel, and the admission was taken shortly after defendant had undergone a lengthy jury trial in which he did not testify, thereby exercising his right to remain silent, it can be reasonably inferred that he was aware of that right. (See *Mosby*, *supra*, 33 Cal.4th at pp. 364-365.)

Defendant also had ample reason to know that admitting his prior strike conviction would result in increased punishment.

The prosecutor's sentencing memorandum, filed prior to defendant's admissions, stated that defendant faced a maximum of 18 years in prison, and requested a sentence of 17 years, calculated in part by doubling the high term as to each count. Defendant's *Romero* motion to dismiss the prior strike conviction and his sentencing memorandum were also filed prior to the admissions and sentencing. The motion recognized that the prior strike conviction had been alleged pursuant to the Three Strikes law, and both the motion and sentencing memorandum requested a sentence of eight years in prison.

Moreover, defendant had the opportunity to object or otherwise alert the court that he was not aware of the increased punishment when entering the admission, but did not do so. "[B]ecause 'advisement as to the consequences of a plea is not constitutionally mandated,' 'the error is waived absent a timely objection.' [Citation.]" (*People v. Villalobos* (2012) 54 Cal.4th 177, 182.) After defendant admitted the prior convictions, but prior to sentencing, defendant was informed that the court would double the base term as to each count due to the strike. The trial court heard the argument of counsel on the *Romero* motion, and then orally stated its intended sentence, which included doubling the middle term as to each count "because of the strike." Defense counsel then submitted the matter "on the paperwork" he had filed, and when the court asked whether defendant waived arraignment for judgment and time for sentencing, defense counsel replied, "Yes. No legal cause." Under such circumstances, defendant was required to object to the sentence. (Cf. *People v. Wrice* (1995) 38 Cal.App.4th 767, 770-771.)

Defendant contends that a timely objection is excused because the court also failed to advise him of his right to remain silent. To support this contention, defendant quotes from *People v. Wrice, supra*, 38 Cal.App.4th at pages 770-771, as follows:

"[W]hen the only error is a failure to advise of the penal consequences, the error is waived if not raised at or before sentencing. [Citation.]" While defendant made two claims of error, we have found no merit to the first, and we observe that the California Supreme Court has stated the necessity of an objection more broadly. (See *People v. Villalobos, supra*, 54 Cal.4th at p. 182 ["'the error is waived absent a timely objection'"].)

Regardless, even if defendant had not forfeited the issue by failing to object, he would nevertheless be required to demonstrate prejudice, and he has failed to do so. "'[T]he failure of the court to advise an accused of the consequences of an admission constitutes error which requires that the admission be set aside only if the error is prejudicial to the accused.' [Citation.] 'A showing of prejudice requires the appellant to demonstrate that it is reasonably probable he would not have entered his plea if he had been told about the [increased punishment].' [Citations.]" (*People v. Walker* (1991) 54 Cal.3d 1013, 1022-1023, overruled on another point in *People v. Villalobos, supra*, 54 Cal.4th at p. 183.) Defendant's showing is insufficient to meet his burden, as he merely surmises that had he known the consequences of admitting a strike prior he might have declined to admit it, and instead "opted 'in favor of throwing a "Hail Mary" at trial' . . . for the possibility, even remote, of avoiding additional prison time."

Defendant has demonstrated no reasonable probability that the prior strike would not have been proven. The prosecutor claimed to possess the documents to do so, and after the admissions were taken, a discussion between the prosecutor and the court showed that court had reviewed the records of the prior convictions. Nor has defendant demonstrated a reasonable probability that he would have been surprised by the potential

punishment or that he would have declined to admit the strike. As respondent notes, the prosecutor represented to the court that the records showed that defendant had pled guilty in one prior case to a non-strike offense in exchange for the dismissal of a strike offense. Here, defendant was represented by counsel, who brought a motion to strike the prior conviction and to sentence defendant to a lesser term than recommended in the prosecutor's sentencing memorandum, which included second strike sentencing. Under all these circumstances, we infer that defendant understood the consequences of a second strike under the Three Strikes law, and an express statement that it could result in a doubling of the base term would not have caused him to change his mind and go to trial on the prior convictions; and we conclude that there would be no reasonable probability of a different result.

Defendant also contends that counsel rendered constitutionally ineffective assistance by not raising the issue, as it was counsel's obligation to investigate and advise his client about the consequences of his admissions. As discussed, it is defendant's burden to demonstrate that trial counsel erred and the error resulted in prejudice. (*People v. Vines, supra*, 51 Cal.4th at pp. 875-876.) Prejudice is shown by "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington, supra*, 466 U.S. at p. 694.) We presume that counsel's performance was competent and the result of sound trial strategy, unless the record affirmatively shows otherwise. (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) We discern nothing in defendant's argument or the record to indicate that defendant has overcome that presumption, as the circumstances summarized above indicate that counsel did in fact investigate

and advise defendant regarding the admission of prior strike convictions.

Moreover, as we have rejected defendant's prejudice argument, we conclude that defendant has failed to show that the result of the proceeding would have been different had counsel objected to the incomplete advisement. Thus defendant's claim of ineffective assistance fails as well.

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT