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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.

JASON E. DEVORE,

Defendant and Appellant.

B276539

(Los Angeles County  
Super. Ct. No. VA135565)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Mildred Escobedo, Judge. Affirmed with directions.

Lynette Gladd Moore, 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, Steven E.  
Mercer and John Yang, Deputy Attorneys General, for Plaintiff and  
Respondent.

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Jason Devore (defendant) was convicted after a jury trial of 14 counts of second degree robbery (Pen. Code, § 211)<sup>1</sup> and five counts of assault on a peace officer with a semiautomatic firearm (§ 245, subd. (d)(2)). The jury found true the firearm allegations related to the assault charges. The trial court found that defendant had suffered one prior serious or violent felony conviction within the meaning of the Three Strikes law. (§§ 667, subds. (b)-(i), 1170.12.) The court sentenced defendant to a total of 111 years four months in state prison. As relevant here, the court doubled defendant's sentence for the assault convictions pursuant to the Three Strikes law.

Defendant appeals, contending there is insufficient evidence to support the count 8 robbery conviction and also contending that the sentences for his assault convictions are not authorized because the prosecutor did not allege that those convictions would be subject to increased punishment pursuant to the Three Strikes law. Defendant contends, and respondent agrees, that the abstract of judgment should be corrected to reflect the trial court's oral pronouncement of judgment concerning the section 12022.53 enhancement imposed to counts 25 and 26.

There is substantial evidence to support the robbery conviction. Defendant received adequate notice that his assault convictions were subject to sentence under the Three Strikes law. We agree that the abstract of judgment must be corrected, as set forth in more detail in our disposition. The judgment of conviction is affirmed in all other respects.

### **BACKGROUND**

Defendant committed a series of robberies at eight different commercial locations between May 23 and June 9, 2014. The robberies involved a total of 14 victims. Defendant's insufficiency of the evidence claim relates only to his

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<sup>1</sup> Further undesignated statutory references are to the Penal Code.

conviction in count 8 for the May 23 robbery of a Subway restaurant and one of its employees, Eboni Sadler. We discuss the facts related to that conviction in section A below.

Defendant committed a series of assaults on June 10, 2014, when law enforcement officials came to a mobile home park in Norwalk to arrest him. Defendant drove up to an empty lot between two trailers in the park, saw law enforcement personnel and cars and ran into a mobile home. Law enforcement personnel on the scene established a perimeter around the home.

The Los Angeles County Sheriff's Department SWAT team arrived. The team used a public address system in an attempt to persuade defendant to come out of the home. After about 30 minutes, sheriff's deputies heard gunshots. The shots seemed to be coming from the home. Although no deputies were hit, five deputies were near areas where bullets hit. Defendant was initially charged with the attempted murder of the five deputies in counts 1 through 5 of the information. On the day jury selection began, the prosecutor amended the information to add counts 22 through 26, which contained five counts of assault against a peace officer using a semiautomatic weapon. These charges involved the same five deputies as did the attempted murder charges and involved the same June 10 incident. Ultimately, the jury deadlocked on the attempted murder charges but convicted defendant of all five assault charges.

## **DISCUSSION**

### **A. Substantial Evidence Supports the Count 8 Conviction**

Defendant robbed a Subway restaurant on May 23, 2014. Two employees were present in the restaurant at the time, and defendant was convicted of one count of robbery for each employee. Defendant contends the

evidence is insufficient to support his conviction for the robbery of Eboni Sadler, who was not present during the entire robbery. Defendant contends such a conviction violates his state and federal constitutional right to due process and a fair trial.

1. *Sufficiency of the Evidence Review*

“In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we “examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—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.” [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] “[I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.” [Citation.] We do not reweigh evidence or reevaluate a witness’s credibility. [Citation.]” (*People v. Nelson* (2011) 51 Cal.4th 198, 210.)

2. *Elements of Robbery*

“Robbery is 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.)

“Possession may be either actual or constructive. [Citation.] Store employees may be in constructive possession of the property of the store. . . . “[T]hus a store employee may be the victim of a robbery even though he is

not its owner and not at the moment in immediate control of the stolen property.” [Citation.] ‘[B]usiness employees—whatever their function—have sufficient representative capacity to their employer so as to be in possession of property stolen from the business owner.’ [Citation.] It is not necessary that an employee have specific responsibility for handling cash in order to be a robbery victim. [Citation.]” (*People v. Gilbeaux* (2003) 111 Cal.App.4th 515, 520-521.) “More than one employee may be in constructive possession of the store’s property at the same time. [Citation.]” (*Ibid.*)

“The element of fear for purposes of robbery is satisfied when there is sufficient fear to cause the victim to comply with the unlawful demand for [her] property. [Citation.]’ [Citation.] ‘Although the victim need not explicitly testify that he or she was afraid in order to show the use of fear to facilitate the taking [citations], there must be evidence from which it can be inferred that the victim was in fact afraid, and that such fear allowed the crime to be accomplished. [Citations.]’ [Citation.]” (*People v. Davison* (1995) 32 Cal.App.4th 206, 212.)

### 3. Analysis

Sadler did not testify at trial; her involvement in the robbery was shown through the testimony of her coworker, Collin Knight. Knight was at the front counter when defendant entered the Subway. Defendant ordered a sandwich, ate the sandwich and returned to the counter to order a second sandwich. As Knight was ringing up the sale, defendant said that he wanted all the money in the register. Defendant said that he had a gun, but did not display one. Knight was afraid and gave the money in the register to defendant.

Defendant told Knight to open the restaurant’s safe. Knight said that he could not open the safe. At trial, the prosecutor asked Knight, “When you

told him that, what happened?” Knight replied, “My other coworker [Sadler] had come out to the front area, and he asked her to open the safe.” Sadler was standing about 10 to 15 feet away from Knight. Sadler “said she couldn’t open the safe, and she wandered away.” Knight was able to extract change from the safe, which he gave to defendant. Defendant left. Sadler “was still in the back.”

Defendant contends Knight’s testimony shows that he did not induce fear in Sadler, and that she did not part with any property. Defendant bases his conclusion that Sadler did not feel fear on Knight’s use of the word “wander” to describe her movement away from the front counter. He understands this word to mean that Sadler “walked away, apparently without concern that defendant would harm her.”

The word “wander” has many subtly different meanings. The Cambridge Dictionary defines “wander” as “to walk around slowly in a relaxed way.”<sup>2</sup> This is the definition which defendant espouses. The Free Dictionary, however, defines “wander” as “to go by an indirect route.”<sup>3</sup> That definition does not suggest relaxation or lack of care.

It is impossible to know precisely what Knight intended to convey by his use of the word “wander.” Even without parsing the meaning of “wander,” however, Sadler’s decision to leave the front of the store after defendant demanded that she open the safe, and to stay in the back of the store, supports an inference that she was afraid of defendant. Absent fear, why leave?

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<sup>2</sup> (<http://dictionary.cambridge.org/us/dictionary/english/wander>.)

<sup>3</sup> (<http://www.thefreedictionary.com/wander>.)

Adopting the Free Dictionary's definition of "wander" strengthens the inference. A decision to go by an indirect route could reasonably indicate a desire to move unobtrusively, that is, to move without being noticed. Such movement, particularly when undertaken after learning that a robbery was in progress, could reasonably support an inference that the wanderer was afraid and did not want to be noticed as she left. This inference is strengthened by Knight's testimony that Sadler was still in the back of the store when defendant left.

Defendant also contends Sadler did not part with any property. Sadler was a Subway employee, and as such could be deemed in constructive possession of the store's property. (*People v. Gilbeaux, supra*, 111 Cal.App.4th at p. 521.) She did not need to directly give up the property to defendant. In *Gilbeaux*, the court affirmed two robbery convictions which identified a grocery store's two janitors as victims. The janitors were tied up in a storeroom while the robbers took the assistant manager to the front of the store and forced him to open a safe and give them the contents. (*Gilbeaux*, at pp. 518-519.)

Although Sadler did not directly give up any property to defendant, she did abandon the safe and Knight. It is reasonable to infer that her departure contributed to Knight's decision to give up more money to defendant. Knight initially told defendant that he could not open the safe. After Sadler said she could not open the safe and left, defendant used the button mechanism on the safe to extract \$20 in small bills. Thus, it is reasonable to infer that Sadler's response to defendant, and her effective abandonment of Knight to defendant, increased Knight's fear. This is a sufficient causal link between defendant's instillation of fear in Sadler and Knight's decision to give defendant an additional \$20.

## **B. Defendant Had Fair Notice of His Potential Sentence**

Defendant contends his Three Strikes sentences for the five assault convictions are not authorized because the People failed to comply with the “strict” pleading and proof requirements of the Three Strikes law for those five convictions. Defendant was entitled to fair notice that his assault convictions were subject to increased punishment under the Three Strikes law. He received such notice.

### *1. Procedural background*

This matter involved two informations filed about six months apart. The amended information was filed on the day jury selection began, and added five counts of assault on a peace officer.

#### *a. Original information*

In an information filed in January 2016, the People charged defendant with five counts of attempted murder (counts 1 through 5) and 16 counts of robbery (counts 6 through 21). The first three pages of the information summarized the charges, with six columns of information for each charge. Reading from left to right, the columns were labeled: (1) “Ct. No.” (2) “Charge” (3) “Charge Range” (4) “Defendant” (5) “Allegation” and (6) “Alleg. Effect.” The charge range listed the base term for each offense, not the total potential term with sentencing allegations. That information was found in the column labeled “Alleg. Effect.” All 21 counts listed “PC 1170.12” in the “Allegation” column and “Life, but Check Code” in the “Alleg. Effect” column.

Pages 4 through 11 of the information contained the factual allegations for each count. Following count 5, the People alleged that all five attempted murders involved the personal use and discharge of a firearm under section 12022.53 “causing the above offense to become a serious felony pursuant to Penal Code section 1192.7(c)(8) and a violent felony within the meaning of



Penal Code section 667.5(c)(8).” After each robbery count, the information alleged that the above offense was a violent felony within the meaning of section 667.5, subdivision (c) and a serious felony within the meaning of section 1192.7, subdivision (c).

At the end of all the counts, the People alleged “that prior to the commission of the offense or offenses alleged in Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21, the defendant, JASON EDWIN DEVORE, had been convicted of the following two or more serious and/or violent felonies, as defined in Penal Code section 667(d) and Penal Code section 1170.12(b):” an August 6, 2003 conviction for violating “18 USC 2113(A)” and a July 9, 2016 conviction for robbery in violation of section 211.

The People also alleged that “Count 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 is a serious and/or violent felony, thus subjecting the defendant to sentencing pursuant to the provisions of Penal Code section 667(b)-(j) and Penal Code section 1170.12.”

*b. Amended information*

The People filed an amended information on June 9, 2016, which added counts 22 through 26 to the information charging five counts of assault on a peace officer. The only allegations listed in the “Allegation” column for the assault counts were firearm allegations pursuant to sections 12022.53 and 12022.5. The “Alleg. Effect” column listed “+20 Yrs., MSP\*.” At the end of the detailed factual allegations for counts 22, 23, 24, 25 and 26, the information stated, “The above offense is a serious felony within the meaning of section 1192.7(c).” Following count 26, the information alleged that the firearm use and discharge for counts 22 through 26 “caused the above offense to become a serious felony pursuant to Penal Code section 1192.7(c)(8) and a violent felony within the meaning of Penal Code section 667.5(c)(8).”

The allegations at the end of all counts remained unchanged from the original complaint. The People again alleged “that prior to the commission of the offense or offenses alleged in Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21, the defendant, JASON EDWIN DEVORE, had been convicted of the following two or more serious and/or violent felonies, as defined in Penal Code section 667(d) and Penal Code section 1170.12(b):” an August 6, 2003 conviction for violating “18 USC 2113(A)” and a July 9, 2016 conviction for robbery in violation of section 211.

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*c. Subsequent proceedings*

When the prosecutor moved for leave to file the amended information, he stated that “the change is the addition of counts 22 through 26 alleging Penal Code section 245(d)(2) which is a related offense to counts 1 through 5.” Defense counsel confirmed he had received a copy of the amended information. The court asked: “Waive reading of the amended information, statement of rights and enter a not guilty, deny all allegations and priors?” Defense counsel replied, “Yes.”

Following a *Marsden*<sup>4</sup> hearing and a hearing on several Evidence Code section 402 matters, defense counsel made a motion to bifurcate the trial of defendant’s prior convictions from the trial of the current charges. The trial court granted the bifurcation. In response to an inquiry by the court, the defendant waived his right to a jury trial on the prior conviction allegations.

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<sup>4</sup> *People v. Marsden* (1970) 2 Cal.3d 118.

*d. Court trial of priors*

Following defendant's convictions for robbery and assault, the court stated it would conduct a court trial on the prior conviction allegation as previously agreed. The prosecutor announced he was unable to proceed on the alleged prior federal conviction for violating 18 United States Code section 2113(a), and the court dismissed that strike.

The trial on the single prior was brief. The prosecutor submitted two section 969(b) packets containing abstracts of judgment for five prior convictions. The trial court admitted the documents into evidence. Defense counsel submitted the matter without argument. As relevant here, the court found that defendant had suffered a conviction for robbery in case No. GA049244, and that the conviction was a prior strike conviction, and also a serious felony within the meaning of section 667, subdivision (a).

The court asked both parties to submit sentencing memoranda, specifying, "What I want and what I am interested in is with the strike, the accumulation of the total years, be they consecutive, be they concurrent."

*2. Notice Under the Three Strikes Law*

Several sections of the Three Strikes law provide that prior convictions must be pled and proved. Most relevant here is subdivision (c)(1) of section 1170.12, which provides that "[i]f a defendant has one prior serious and/or violent felony conviction as defined in subdivision (b) that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction."<sup>5</sup>

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<sup>5</sup> Related general provisions include section 1170.12, subdivisions (a)(1) and (d)(1). Subdivision (a)(1) provides that "if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior serious and/or violent felony convictions, as defined in subdivision

Under the Three Strikes law, each sentence for a subordinate term must be computed separately (*People v. Nguyen* (1999) 21 Cal.4th 197, 207). The Three Strikes law “does not provide for any kind of ‘added term.’” Instead, it defines the term for the crime itself, supplanting the term that would apply but for the prior serious or violent felony.” (*People v. Martin* (1995) 32 Cal.App.4th 656, 667, overruled on another ground in *People v. Deloza* (1998) 18 Cal.4th 585, 593.)

Defendant contends the pleading and proof provisions of the Three Strike law, read together with the law’s individual computation procedure, create a strict statutory requirement that the prosecutor specifically allege the People are seeking to impose punishment pursuant to the Three Strikes law *for every count in which such punishment is sought*. We see no such specific requirement.

Defendant relies on *People v. Haskin* (1992) 4 Cal.App.4th 1434 (*Haskin*), *People v. Arias* (2010) 182 Cal.App.4th 1009 (*Arias*), and *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*) to support his argument that a specific allegation of increased punishment is required for each count of an information. These cases do not involve allegations under the Three Strikes law and so are not directly applicable to this case.

In *Haskin*, the court found inadequate notice was provided by the enhancement allegation concerning a particular prior conviction admitted by the defendant. The information alleged the prior conviction involved a prison

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(b), the court shall adhere to each of the following” general sentencing conditions, which involve such matters as the defendant’s lack of probation eligibility and the requirement that he or she be committed to state prison.

Subdivision (d)(1) provides that “this section shall be applied in every case in which a defendant has one or more prior serious and/or violent felony convictions as defined this section. The prosecuting attorney shall plead and prove each prior serious and/or violent felony conviction.”

term within the meaning of section 667.5, but after the defendant admitted the conviction, the trial court found that it was a serious felony within the meaning of section 667, subdivision (a). (*Haskin, supra*, 4 Cal.App.4th at pp. 1437-1438.)

In *Arias*, the court found a lack of notice due to the failure to allege that the attempted murders charged were willful, deliberate and premeditated, an allegation related to the circumstances of the commission of the crime. (*Arias, supra*, 182 Cal.App.4th at p. 1017.)

In *Mancebo*, the court considered the omission of an allegation that defendant was subject to increased punishment under section 667.61 (the One Strike law) because his convictions involved multiple victims. Defendant had been charged with and convicted of crimes with different victims, but a multiple victim circumstance pursuant to section 667.61, subdivision (e)(5) had not been pled. (*Mancebo, supra*, 27 Cal.4th at pp. 738-739.) As our Supreme Court explained, “the One Strike law clearly applies only if the information alleges facts, and also the ‘circumstances specified in subdivision (d) or (e) which are required for the punishment provided in subdivision (a) or (b) [are] *pled and proved* . . . .’ (§ 667.61, subd. (f).)” (*Mancebo*, at pp. 744-745.) The Three Strikes law contains no provision comparable to section 667.61, subdivision (f).

These three cases cited by defendant do stand for the general proposition that a defendant is entitled to fair notice of the factual allegations that will be invoked to impose a sentence enhancement or otherwise increase the punishment for a charged crime. (See *Mancebo, supra*, 27 Cal.4th at p. 747.) That notice requirement was satisfied here.

The circumstances show defendant was aware he was subject to punishment under the Three Strikes law for any assault conviction. The

information clearly alleged the prosecutor would seek to impose punishment under the Three Strikes law for the original attempted murder charges. The assault charges were added as a lesser related offense to the attempted murder charges. The amendment followed a vigorous attempt by defendant to have the attempted murder charges dismissed. The prosecutor had opposed defendant's attempts to dismiss the attempted murder charges, and clearly believed that defendant deserved the maximum penalty for shooting at the deputies under whichever statute defendant was convicted. The prosecutor sought 20-year firearm enhancement terms for the assault counts, dispelling any reasonable possibility that a lesser punishment was being sought for the lesser related assault charges. Assault on a peace officer is a serious felony, making that offense eligible for punishment under the Three Strikes law. The factual allegations for each assault count specifically state that the offense is a serious felony under section 1192.7, the only fact required for imposition of sentence under the Three Strikes law.

The issue of punishment does not appear to have been discussed during the jury trial, or during the court trial on the priors. At the conclusion of the priors trial, the court requested sentencing memoranda, and expressly stated its interest in, "with the strike, the accumulation of the total years." Defendant did not submit a sentencing memorandum. The prosecutor's sentencing memorandum sought a doubling of the sentences for the assault convictions pursuant to the Three Strikes law. Defense counsel did not object or express any surprise at this request during the sentencing hearing. Although defense counsel raised questions about the imposition of firearm enhancements, he did not object to the trial court's doubling of the base terms for the assault convictions. Counsel's silence creates a strong inference that he understood all along that the prosecutor was seeking Three Strikes

punishment for every count in the information. Defendant's right to fair notice was not violated.

**C. The Abstract of Judgment Must Be Corrected**

At the sentencing hearing, the trial court stated it was imposing one-third the midterm of seven years for the section 12022.53, subdivision (c) firearm enhancement to counts 25 and 26. This corresponds to the verdicts in the case and to the midterm sentence for that enhancement. The abstract of judgment states that the enhancement is imposed pursuant to section 12022.53, subdivision (b). The parties agree that is not the correct subdivision and should be corrected. We agree as well. As a general rule, the oral pronouncement of the court must prevail over the abstract of judgment. (See, e.g., *People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Accordingly, we order the abstract of judgment corrected. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385-386.)

**DISPOSITION**

The clerk of the superior court is instructed to prepare an amended abstract of judgment showing that the firearm enhancement to counts 25 and 26 is imposed pursuant to subdivision (c) of section 12022.53, and to deliver a copy to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.**

GOODMAN, J.\*

We concur:

ASHMANN-GERST, Acting P.J.      HOFFSTADT, J.

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