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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN TAPP,

Defendant and Appellant.

B236715

(Los Angeles County
Super. Ct. No. NA089089)

APPEAL from a judgment of the Superior Court of Los Angeles County. Arthur H. Jean, Jr., Judge. Affirmed in part and reversed in part with directions.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, and Sonya Roth, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Kevin Tapp appeals from the judgment entered following a jury trial in which he was convicted of assault with a deadly weapon or by force likely to produce great bodily injury and of disobeying an order of a domestic relations court. Defendant contends insufficient evidence supported the trial court's finding that his prior negligent discharge of a firearm conviction was a "strike" and that the trial court abused its discretion by denying his motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529–530 (*Romero*). We agree with respect to defendant's sufficiency of evidence claim and vacate the trial court's finding as to that prior conviction.

BACKGROUND

Defendant and Tanji Harris were married with six children. In December of 1998 defendant stabbed Harris numerous times in the face and ear. He was convicted of corporal injury to a spouse with a finding that he personally inflicted great bodily injury. He served 12 years in prison for that conviction and was released on parole in July of 2010. Although one of his parole conditions prohibited him from having any contact with Harris, they lived together from September 2010 to January 1, 2011, when defendant's parole was revoked for violating the no-contact condition. While defendant was incarcerated in 2011, Harris obtained a restraining order requiring defendant to stay away from her, her residence, and her car.

Defendant was re-released on parole on May 31, 2011. (Undesignated date references pertain to 2011.) At about 5:30 p.m. that day, he phoned Harris at her San Pedro home and asked her if she had his \$700. She said she had used it to pay the rent. Defendant said something like, "Well, this is the old Kevin. You're going to see the old Kevin." Harris testified that "the old Kevin" was "mean." Harris went out to move her car so that it would look like she was not home. As she drove down the side street, she saw defendant's van parked in the alley behind her home. She phoned 911 and reported that defendant was at her home in violation of a restraining order, then she drove to a gas station.

Keewon, defendant and Harris's son, testified that he emerged from his bedroom at about 6:00 p.m. on May 31 and heard a scuffle occurring in his mother's bedroom. Derek, who was Harris's boyfriend, emerged from Harris's bedroom looking red-faced, out-of-breath, and disheveled. Defendant was standing in Harris's bedroom holding a screwdriver. Keewon told Derek to leave.

While Harris was at the gas station, she phoned someone and learned that defendant was no longer at her home. As she was driving home, she saw defendant driving his van. She phoned 911 again and stayed on the line with the dispatcher. As Harris was stopped at a stop sign, defendant's van struck the back of Harris's car and pushed her into the intersection. Harris sped away at 40 to 50 miles per hour. Thereafter, defendant repeatedly crashed his van into the back of Harris's car as she sped down several streets, running stop signs and red lights. Eventually, she told defendant to stop and promised she would pull over. Then she heard sirens and told the 911 dispatcher to direct the police to a particular gas station. Harris pulled into that gas station and got out of her car. Defendant did the same. Seconds later, the police arrived. Defendant asked Harris to tell the police he did not "do this." Harris denied that she struck defendant's van with her car. A police officer who responded to the gas station testified that the bumper on Harris's car was hanging down.

Jasmine, defendant and Harris's daughter, testified for the defense that she let defendant into Harris's home on May 31. Harris was not home at the time. Defendant went into the back bedroom, where Derek was. Jasmine heard defendant say, "Get out," but she heard nothing else and did not see Derek leave. Soon thereafter, defendant left. He did not appear to be carrying anything.

Defendant testified that after his release on May 31, he phoned Harris and asked if she had used his money for rent. She said she had, but he was not upset and did not ask to get the money back because he had been living with Harris before his parole was revoked, and it was appropriate for him to pay a share of the rent. He also asked if she had his stereo and cell phone and if he could retrieve them. She said she would be gone when he

arrived. Defendant subsequently called Jasmine, who confirmed that Harris had left and let him in when he arrived. He went into Harris's bedroom and was surprised, but not upset, to see Derek there. Derek leaped off the bed. Defendant said he was just there to get his stereo. Derek disputed defendant's claim to the stereo and grabbed defendant. They both fell to the floor, but quickly let go of one another. Derek walked out, telling defendant to take the stereo. Defendant picked up a screwdriver that was sitting on the table and loosened the speaker wires. He put the stereo next to the door, then left to buy beer.

As defendant was driving to get beer, Harris sideswiped his van. He honked his horn and began following her to ask why she had done that. He insisted that they ran just one stop sign and no red lights. At one point, Harris slammed on her brakes and defendant, who was following too closely to stop, crashed his van into the back of her car.

The jury acquitted defendant of burglary and assault on Derek with a deadly weapon, but convicted him of assault on Harris with a deadly weapon or force likely to produce great bodily injury and of disobeying an order of a domestic relations court. Defendant waived a jury trial on the prior conviction and prison term allegations, and the court found all of the allegations true, including allegations he had suffered two prior serious or violent felony convictions. Defendant moved to dismiss the prior conviction findings so that he could be sentenced more leniently. The court denied the motion, struck all findings under Penal Code sections 667, subdivision (a)(1), and 667.5, subdivision (b), and sentenced defendant to a third strike term of 25 years to life in prison.

DISCUSSION

The information alleged that defendant had three prior serious or violent felony convictions within the scope of the "Three Strikes" law: 1993 convictions in the same case for negligent discharge of a firearm and possession of a firearm by a felon, and a 1999 conviction of corporal injury upon a spouse with a finding of personal infliction of great bodily injury.

The prosecutor introduced certified abstracts of judgment from the 1993, 1999, and other cases, along with chronological prison histories, photographs, and fingerprint cards. With respect to the 1993 case, the abstract of judgment reflects imposition of concurrent one year four month terms for the two offenses.

The parties agree that negligent discharge of a firearm only qualifies as a serious or violent felony if the defendant personally uses a firearm in the commission of that offense. Defendant contends that the prosecutor introduced no evidence showing that he personally used a firearm in that conviction, while the Attorney General argues that defendant's conviction in the same case of possession of a firearm, coupled with the stay "most likely pursuant to [Penal Code] section 654" of the sentence on the possession count, supports a reasonable inference that he did. As noted, the sentence on the possession conviction was concurrent, not stayed.

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable trier of fact could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) Substantial evidence is "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." (*People v. Tully* (2012) 54 Cal.4th 952, 1006.)

Nothing in the documentary evidence introduced by the prosecutor regarding the strikes constitutes substantial evidence showing that defendant personally used a gun in the commission of his negligent discharge offense. He could have aided and abetted the negligent discharge offense by providing a gun that he possessed (giving rise to his felon in possession conviction) to another person, who negligently discharged it. Accordingly, we reverse the trial court's finding in this case that the prior negligent discharge conviction constituted a strike. We further note that the felon in possession conviction also fails to qualify as a strike, but it appears that the trial court did not find it to be a strike. Thus, defendant's third strike sentence must be vacated.

Because neither the California nor federal Constitutions bar retrial of a prior conviction enhancement allegation (*Monge v. California* (1998) 524 U.S. 721, 734 [118 S.Ct. 2246]; *People v. Monge* (1997) 16 Cal.4th 826, 843–845), the prosecutor may retry the strike allegation.

Because defendant's *Romero* motion asked only that the court vacate its finding as to the 1991 negligent discharge of a firearm conviction and sentence him to a second strike term, our disposition moots, as least at this time, defendant's contention that the trial court abused its discretion by denying that motion. If the strike allegation as to the 1991 conviction is retried and found true, defendant may renew his *Romero* motion prior to resentencing.

DISPOSITION

The trial court's finding that defendant's prior Penal Code section 246.3 conviction constituted a serious or violent felony is reversed and defendant's sentence is vacated. The judgment is otherwise affirmed. The cause is remanded for a retrial of the allegation that prior Penal Code section 246.3 conviction constituted a serious or violent felony, if the prosecutor elects to retry the allegation, and for resentencing.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.