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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. RAUL GONZALES TORRES, Defendant and Appellant.	B234570 (Los Angeles County Super. Ct. No. VA118106)

THE COURT:*

Raul Gonzales Torres appeals following a jury trial that resulted in his conviction of second degree robbery (Pen. Code, § 211)[1] (count 1) and second degree commercial burglary (§ 459) (count 2). Appellant admitted having served a prior prison term within the meaning of section 667.5, subdivision (b) in case No. 06NF1288 with a conviction date of August 11, 2006. Appellant admitted a prior conviction in case No. VA057006 for a violation of section 245, subdivision (a)(2) with a conviction date of May 8, 2011.

The trial court found that the conviction in case No. VA057006 was for a serious or violent felony under the three strikes law. (§§ 667, subd. (a)(1), 667, subds. (b)-(i),

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* BOREN, P. J., ASHMANN-GERST, J., CHAVEZ, J.

1 All further references to statutes are to the Penal Code unless stated otherwise.

1170.12, subds. (a)-(d).) After denying appellant's *Romero*[2] motion, the trial court sentenced appellant to a total sentence of 10 years. The sentence consisted of the low term of two years for the robbery, doubled to four years under the three strikes law. The trial court imposed a consecutive five years for appellant's prior serious felony conviction under section 667, subdivision (a)(1) and a consecutive one-year term for appellant's prior prison term under section 667.5, subdivision (b).

We appointed counsel to represent appellant on this appeal. After examination of the record, counsel filed an "Opening Brief" containing an acknowledgment that he had been unable to find any arguable issues. On December 9, 2011, we advised appellant that he had 30 days within which to personally submit any contentions or issues that he wished us to consider. Appellant filed three documents in response: one declaration in support of request to recall sentence pursuant to section 1170, subdivision (d) and two supplemental briefs.

The record shows that on December 31, 2010, Justin Rima, a loss prevention agent at a Cerritos Best Buy store, heard the alarm go off in the appliance department at approximately 5:30 p.m. It was a half hour before closing. Rima ran to the emergency exit and found the door ajar. He looked outside and saw a green or black car parked parallel to the door. Rima identified appellant in court as the person he saw loading laptops into the backseat of the car. Rima could tell by the boxes that one was a Dell and one was a Toshiba. Rima said, "What the fuck are you doing?" The driver of the car pointed a gun at Rima and said, "Don't fucking worry about it." Rima was shaken up, and he backed away. Appellant jumped into the backseat of the car, and it left. As the car drove away, Rima heard cheering noises from the two men. Rima called the sheriff. Upon viewing the store's security footage, Rima identified appellant entering the store and inside the store. The store manager, Tony Bauguess, ascertained that one Dell computer was missing.

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

Shortly before the robbery, at approximately 5:18 p.m., appellant was stopped driving a dark green Lexus without a rear license plate. He had a male passenger. Appellant gave the officer his driver's license and retrieved the license plate from the rear floorboard. The traffic stop occurred about one block from the Best Buy store.

Detective Randall Algra responded to a location on East Appleton Street in Long Beach on January 4, 2011. The location was near appellant's residence, and Detective Algra saw a dark green Lexus parked nearby. The Lexus had the same license number as the car appellant was driving on December 31, 2010. Detective Algra searched the Lexus and found a replica of a black semiautomatic handgun on the right rear passenger floorboard.

The parties stipulated that appellant was detained by detectives on January 4, 2011. Upon searching appellant, the detectives found a cell phone, which they handed over to Detective Aaron King. There were photographs on the cell phone depicting a computer and a computer box for exactly the type of computer taken from Best Buy.

After the guilty verdicts were returned, the trial court conducted a hearing on the issue of whether the prior conviction in case No. VA057006 was a serious or violent felony. Both parties submitted sentencing memoranda and offered no further argument. The trial court concluded that the prior conviction qualified as a serious or violent felony. The trial court stated it had reviewed and taken judicial notice of the case file for that conviction and had reviewed the plea form. Appellant was charged with an assault with a firearm against Michael Estrada and Cecilia Estrada. The transcript of sentencing in that case showed that appellant was advised that the conviction would be considered a strike and that it might result in an enhancement of sentencing in any further criminal convictions.

Appellant contends in his brief filed December 19, 2011, that in his 1999 case, which resulted in the 2001 conviction, he "signed for a county lid" and "no strike." In 2003, he received community service after a petty theft conviction in West Covina. Appellant asserts that, if he had a strike, he would have done jail time. In 2006, an

Orange County judge told appellant that "it looks like a strike but it's not" and told appellant to change it when he got out. In 2011, a court in Downey told appellant he had a strike, but appellant maintains he does not have one. Appellant recites other parts of his criminal history in various courts in Southern California in order to show that he has no strike. He states that he deserves no more than three and one-half years for the current case, which he asserts is a grand theft case.

Appellant recites the same arguments about his strike offense in his brief filed on January 13, 2012. He adds that the Best Buy store did not have cameras outside and asks how the store personnel knew where the car was parked. He points out that the witness said at the preliminary hearing that there were two men loading computers into the car, but the witness testified at trial that only appellant was doing the loading. Appellant argues that this witness does not know, or he is just saying things. Appellant asserts he went in the store and took two laptops and ran out without threatening anyone or saying anything.

In appellant's declaration in support of a request to recall the sentence, which appellant executed on February 2, 2012 (approximately seven and one-half months after his June 17, 2011 sentencing), he asserts the same arguments as in his first and second briefs, i.e., that various trial courts have told him that he did not have a strike. He attaches what he asserts is a page from his "strike hearing."

Evidentiary Issues

To answer appellant's question, the Best Buy personnel knew where the car was parked because Rima saw it parked outside the emergency door that triggered the alarm upon being opened. Rima testified to that fact.

As for the inconsistency between the number of men Rima saw loading computers into the car, we conclude this argument is without merit. Defense counsel cross-examined Rima on this inconsistency. Rima testified that the prior testimony was incorrect. The transcript of the preliminary hearing reveals that, apart from the mention of "two males" in Rima's narrative answer to the question "What happened?" the rest of

Rima's testimony was made with reference to one male loading and one man sitting in the driver's seat. The jury was instructed to consider whether the witness made a statement in the past that was inconsistent with his testimony and also not to automatically reject testimony just because of inconsistencies or conflicts. The jury was reminded that people sometimes honestly forget things or make mistakes about what they remember. (CALCRIM No. 226.) The jury reached its decision with all of these factors in mind. Claims that witnesses gave inconsistent testimony and lacked credibility are merely attempts to have this court reweigh the evidence, which is not our role. (*People v. Culver* (1973) 10 Cal.3d 542, 548.)

Although appellant may not have threatened anyone or said anything, his jury was instructed on aider and abettor liability and on the natural and probable consequences doctrine. The evidence was sufficient to support appellant's convictions in counts 1 and 2 on the basis of either of these theories, at a minimum. (CALCRIM Nos. 400, 401, 402, 1603.) Appellant's arguments are without merit.

Appellant's Strike Conviction

The page appellant proffers as a page from his strike hearing is a page from the reporter's transcript of the preliminary hearing in the instant case, which took place on March 3, 2011. On that page, after holding appellant to answer for the robbery and burglary, Judge Tipton of the Superior Court in Los Cerritos stated that appellant should "be admitted to bail in the sum—actually, because of the misfiling of the strike, bail should be $110,000 . . . ." There is no record as to what misfiling Judge Tipton was referring. The record shows that when appellant was arraigned on the amended information filed on March 17, 2011, the strike offense in question was alleged.

The probation report confirms appellant's assertion that his 2001 conviction in case No. VA057006 was the result of an assault with a firearm (§ 245, subd. (a)(2)) that was committed in 1999. This court has also examined and taken judicial notice of the court file from case No. VA057006, which shows that appellant pleaded guilty on May 8, 2001, and was informed that "this charge may serve to enhance any future felonies you

may be convicted of and may be considered a strike." When asked if he understood, appellant replied, "Yes, maybe." Appellant's counsel stated, "We're saying maybe because it's a strike." The prosecutor replied, "The state of the law isn't in question but it may be considered as a strike. Do you understand that?" Appellant replied, "Yes." The prosecutor then indicated for the record that appellant was an aider and abettor in the crime. Defense counsel noted that, "this also occurred before Prop. 21 was enacted."

To be considered a strike, a prior conviction must be for a serious felony (as defined in § 1192.7, subd. (c)), or a violent felony (as defined in § 667.5, subd. (c)). (§ 667, subd. (d)(1).) At the time appellant committed the assault with a firearm, that offense was only a serious felony if the defendant personally used a firearm, which the prosecution conceded appellant had not done. (See *People v. Rodriguez* (1998) 17 Cal.4th 253, 261.) In March 2000, the electorate approved Proposition 21, which expanded the list of serious felonies to include "assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245," omitting any requirement for personal use. (§ 1192.7, subd. (c)(31); *People v. Winters* (2001) 93 Cal.App.4th 273, 276-277.) Although appellant's offense, to which he pleaded guilty in May 2001, was committed before the enactment of Proposition 21, plea bargains are "'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws. . . .'" (*People v. Gipson* (2004) 117 Cal.App.4th 1065, 1070.)

Appellant's current offenses were committed after Proposition 21 was enacted. Section 667.1, which was enacted as part of Proposition 21, provides that "[n]otwithstanding subdivision (h) of section 667, for all offenses committed on or after the effective date of this act, all references to existing statutes in subdivisions (c) to (g), inclusive, of Section 667 are to those statutes as they existed on the effective date of this act, including amendments made to those statutes by the act . . . ." Thus, the revised list of qualifying offenses enacted with Proposition 21 brings to bear the full effect of the three strikes law upon appellant's current convictions. In *People v. James* (2001) 91

Cal.App.4th 1147, we held "that if a defendant's current offense was committed on or after the effective date of Proposition 21, a determination whether the defendant's prior conviction was for a serious felony within the meaning of the three strikes law must be based on the definition of serious felonies in Penal Code section 1192.7, subdivision (c) in effect on March 8, 2000." (*Id.* at p. 1150.) Thus, under the law in effect at the time of appellant's current offense, the trial court properly determined that appellant's prior conviction constituted a strike for purposes of the three strikes law. Moreover, in the instant case, as the trial court noted and as we have quoted *ante*, appellant was thoroughly advised regarding the potential strike consequences of his plea.

We have examined the entire record, and we are satisfied that appellant's attorney has fully complied with his responsibilities and that no arguable issues exist. (*People v. Wende* (1979) 25 Cal.3d 436, 441.)

The judgment is affirmed.

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