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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DEVONTA JAMAL McCULLEY-BOYER, Defendant and Appellant.	2d Crim. No. B280103 (Super. Ct. No. VA140703) (Los Angeles County)

Devonta Jamal McCulley-Boyer appeals his conviction by jury of attempted corporal injury to a child's parent with a prior conviction (count 1; Pen. Code, §§ 664/273.5, subd. (f)(1))[1], misdemeanor battery on a child's parent (count 2; § 243, subd. (e)(1)), and misdemeanor vandalism (count 3; § 594, subd. (a)). In a bifurcated proceeding, the trial court found that appellant was convicted of a prior strike (§§ 667, subd. (d); 1170.12, subd. (b)) and sentenced appellant to five years state

[1] All statutory references are to the Penal Code.

prison. We modify the judgment on count 1 to reflect that appellant was convicted of attempted corporal injury of a child's parent (§§ 664/273.5, subd. (a)) and remand for resentencing. (§ 1260.) On count 2 for battery (§ 243, subd. (d)), the trial court is directed to impose sentence and stay execution of the sentence pursuant to section 654. (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1472.) With respect to the prior strike, we vacate the prior strike finding and remand for retrial and resentencing. As modified, the judgment of conviction is affirmed. (§ 1260.)

Facts

On the evening of December 1, 2015, appellant choked and hit his ex-girlfriend, P.D. in the parking lot at Cerritos College. P.D. was the mother of appellant's five-year old child and had an on-and-off relationship with appellant marked by the following acts of domestic violence.

In 2010, P.D told appellant that she was pregnant with his child and planned to get an abortion. Enraged, appellant punched P.D. five or six times in the face, fracturing her nose. P.D. decided to keep the baby and was awarded sole legal and physical custody. In 2011, appellant was convicted by plea of battery causing serious bodily injury. (§ 243, subd. (d).)

In 2012, appellant argued with P.D., threw her on the couch, and choked P.D. as she held the baby. Brandishing a kitchen knife, appellant threatened to kill P.D. Appellant took the baby to the kitchen and tried to kill himself by drinking bleach. Appellant moved out and threatened to kill P.D. if she kept his son from him or dated other men. P.D. reported the matter to the police and had no contact with appellant for the next two years.

In December 2015, appellant called P.D., asked who she was dating, and wanted to see her right away. P.D. told appellant to meet her at the Cerritos College parking lot at 11:00 p.m. When appellant arrived, P.D. was angry that appellant was dating other women and said she would continue dating men. Appellant tossed her car keys out the window, pulled her hair, and smashed the windshield. Appellant became more enraged when P.D. refused to open the driver's door and grabbed P.D. by the neck, choking her for 15 to 20 seconds.

Appellant drove away. P.D. hid behind a trash can and called 911. When appellant returned, he was detained by two Los Angeles County Sheriff's Deputies and put in the back of a patrol car. Cerritos College Police Department Officer Ricardo Bustamante arrived seconds later and took over the investigation. Officer Bustamante spoke to P.D. and then asked appellant "'What's going on?'" Appellant said that P.D. was mad that he had a girlfriend. When P.D. refused to give him his phone back, appellant broke the car's windshield. Officer Bustamante asked if he hit P.D. and appellant said "'Yes.'" Appellant was then arrested, transported to the campus police station where he waived his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436) and again said that he hit or choked P.D.

Motion to Exclude Pre-Miranda Statements

Appellant argues that the trial court erred in not excluding his out-of-court statements. Before trial, appellant moved to exclude his pre-arrest statements on the ground they were made during a custodial interrogation and no *Miranda* warnings were given. Officer Bustamante testified that appellant was sitting in the back of the patrol car with the door open, and that appellant was not in handcuffs or in custody.

Officer Bustamente asked, "'Hey, man. What's going on? What happened?'" Appellant said that P.D. took his phone and started hitting him, and that he tried to push her away. Officer Bustamente asked if he hit P.D. Appellant answered "'Yes'" and then was arrested.

The trial court found that it was not a custodial interrogation and that no *Miranda* warning was required. "[T]he length of the detention, the fact that handcuffs are not used, the fact that the officer who has jurisdiction over this incident arrives minutes later and [the deputies] just hand over the investigation to him indicates to me this is just a detention and still in the investigatory status and it's not akin to a formal arrest."

We defer to the trial court's factual findings supported by substantial evidence and independently determine whether appellant was in custody for *Miranda* purposes. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1400.) *Miranda* advisements are required when a person is subject to "custodial interrogation." (*Miranda*, *supra*, 384 U.S. at p. 444.) Custodial interrogation "[g]enerally . . . does not include a temporary detention for investigation. [Citation.] Such a detention . . . allows 'the officer . . . [to] ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions.' [Citation.]" (*People v. Clair* (1992) 2 Cal.4th 629, 679.) The *Miranda* opinion itself permits "[g]eneral on-the-scene questioning as to facts surrounding a crime . . . ." (*Miranda*, *supra*, at p. 477.)

Our courts have "'identified a number of objective indicia of custody for *Miranda* purposes, such as (1) whether the suspect has been formally arrested, [fn.] (2) absent formal arrest, the length of the detention, [fn.] (3) the location, (4) the ratio of

officers to suspects, [and] (5) the demeanor of the officer, including the nature of the questioning.' [Citation.]" (*People v. Bellomo* (1992) 10 Cal.App.4th 195, 198-199.) The officer's uncommunicated intent to arrest "has no bearing on the question whether a suspect was 'in custody' at a particular time . . . ." (*Berkemer v. McCarty* (1984) 468 U.S. 420, 442; see *People v. Stansbury* (1995) 9 Cal.4th 824, 830.) The ultimate inquiry is whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. (*Yarborough v. Alvarado* (2004) 541 U.S. 652, 663.)

As soon as Officer Bustamante arrived, the deputies handed the investigation over to him. Appellant had been in the patrol car no more than 90 seconds after the 911 call was made. One of the deputies indicated that he took appellant "into custody without incident" and spoke to him. Officer Bustamante testified that appellant was not handcuffed and that no weapons were drawn. "It was just an investigation" and appellant "told me his side of the story."

The trial court correctly found that it was not a custodial interrogation. Officer Bustamante asked an open-ended question, "What's going on?" The conversation was brief and casual and no one told appellant that he was under arrest or not free to leave. "'Absent "custodial interrogation," *Miranda* simply does not come into play.' [Citation.]" (*People v. Clair*, *supra*, 2 Cal.4th at p. 679.)

Appellant argues that the deputies did not testify and it is unknown whether they said or did anything that might cause a reasonable person to believe he was in custody. One of the deputies told Officer Bustamente that "he was able to talk to [appellant] without any problems, no confrontation" and that

appellant was cooperating in the investigation. Appellant speculates that the deputies may have put him in the patrol car "with guns drawn." Officer Bustamante wrote in a report that the deputies told him that they had taken appellant into custody. On cross-examination, Officer Bustamante was asked about the report and said that appellant was sitting in the back of the patrol car with the door open. It looked like appellant was free to leave. The trial court rejected the argument that appellant was already in custody because the deputies "don't have jurisdiction. . . . [I]t sounds like there's a radio call, sheriffs get there, they detain him. He is sitting in a patrol car without handcuffs." On review, we must accept the trial court's resolution of disputed facts and inferences, including credibility determinations, where they are supported by substantial evidence. (*People v. Weaver* (2001) 26 Cal.4th 876, 918-919.) The subjective views harbored by the deputies, by P.D., or appellant as whether it was a custodial interrogation are irrelevant. (*People v. Kopatz* (2015) 61 Cal.4th 62, 80.)

Appellant's reliance on *People v. Bejasa* (2012) 205 Cal.App.4th 26 (*Bejasa*) and *In re Joseph R.* (1998) 65 Cal.App.4th 954, are misplaced. They are factually distinguishable. In *Bejasa*, defendant was involved in a head-on auto collision, causing serious bodily injury to his passenger. (*Bejasa*, *supra*, at p. 30.) Police asked preliminary questions during which defendant admitted he was on parole. (*Id.* at p. 37.) The officers searched appellant, found methamphetamine, handcuffed defendant and put him in a patrol car, and told him that he was being detained for a possible parole violation. (*Ibid.*) The officers then took defendant out of the patrol car and interrogated him without providing a *Miranda* advisement. The

Court of Appeal held that it was a custodial interrogation. "Defendant was confronted with two of the most unmistakable indicia of arrest: he was handcuffed and placed in the back of a police car. A reasonable person, under these circumstances would feel restrained to a "'degree associated with formal arrest.'" [Citation.]" (*Ibid*.)

In *In re Joseph R.*, *supra*, 65 Cal.App.4th 954, an officer told defendant that a witness saw him throw a rock at a bus. Defendant was handcuffed and locked in the back of a patrol car for five minutes. (*Id.* at p. 957.) When the officer returned, he took defendant out of the car, removed the handcuffs, and questioned him about the incident. The entire "encounter" lasted 15 to 20 minutes. (*Id.* at p. 961.) The Court of Appeal held that no *Miranda* warnings were required because the minor was not told he was under arrest or that he would be arrested unless he cooperated. (*Id.* at p. 958.) In a footnote, the court opined that had defendant been questioned while handcuffed in the car, "the interrogation would have been accompanied by restraints that are normally associated with an arrest, thereby requiring *Miranda* warnings be administered. [Citations.]" (*Ibid*, fn. 5.)

Although a deputy did tell Officer Bustamente that they had taken appellant into custody, there is no evidence that appellant heard the remark or was told that he was under arrest. Officer Bustamente stated that appellant was sitting in the back of a patrol car with the door open, and that appellant was not in handcuffs. The act of putting a suspect in a patrol car does not constitute an arrest or require a *Miranda* warning before the officer questions the suspect. (See, e.g., *United States v. Parr* (9th Cir. 1988) 843 F.2d 1228, 1231.) Officer Bustamente asked "What's going on?" and had a brief casual conversation with

appellant. "*Miranda* warnings are not required 'until such time as the point of arrest or accusation has been reached or the questioning has ceased to be brief and casual and become sustained and coercive.' [Citation.]" (*People v. Davidson* (2013) 221 Cal.App.4th 966, 973.)

Post-Miranda Statement

Appellant argues that his post-*Miranda* statement at the campus police station was the product of a deliberate two-step interrogation technique prohibited by *Missouri v. Seibert* (2004) 542 U.S. 600 (*Seibert*). Appellant forfeited the error by not raising the claim in the trial court. (*People v. Williams* (2010) 49 Cal.4th 405, 424.) On the merits, the argument fails. In *Seibert*, defendant was arrested and questioned about a murder for 30 to 40 minutes without a *Miranda* advisement. (*Seibert*, *supra*, at pp. 604–605.) After defendant confessed, the interrogation ceased for 20 minutes. Defendant was then given *Miranda* warnings and confronted about her pre-*Miranda* statements, and confessed again. (*Id*. at p. 605.) The officer stated that he made "a 'conscious decision' to withhold *Miranda* warnings [based on] an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question 'until I get the answer that she's already provided once.'" (*Id*. at pp. 605–606.) The *Seibert* court found that the manner in which the interrogation was conducted challenged the "comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." (*Id.* at p. 617.)

Here the record is devoid of any suggestion that a two-step *Seibert* interrogation process was used. Appellant freely

and voluntarily waived his *Miranda* rights at the campus police station and said that he pushed P.D. to stop her from hitting him and punched out the windshield. Officer Bustamante reminded appellant that, during the investigation, appellant said that he hit P.D. Appellant said, "'Oh, yeah.'"

Attempted Corporal Injury to a Child's Parent With a Prior

Appellant argues, and the Attorney General agrees, that attempted corporal injury to a parent with a prior conviction is not a crime. The jury returned a not guilty verdict on the charged offense of corporal injury on a child's parent with a prior (§ 273.5, subd. (f)(1)) and convicted appellant of attempted corporal injury *with a prior conviction* (§§ 664/273.5, subd. (f)(1)). At sentencing, appellant argued that the two year, three year, and four year sentence triad set forth in section 273.5, subdivision (a) applied. The trial court ruled that section 273.5, subdivision (f)(1) provided for an enhanced sentence triad (i.e., two, four, or five years) and sentenced appellant to the upper term of 30 months (i.e., one-half the upper term) and doubled the sentence to 60 months based on the prior strike.[2]

It is well-settled that an attempt to commit a crime is an offense separate and distinct from the completed crime. (*People v. Reed* (2005) 129 Cal.App.4th 1281, 1283.) Because section 273.5, subdivision (f)(1) provides an enhanced sentence for "conviction" of corporal injury to a parent with a prior, but not

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[2] Section 273.5, subdivision (a) provides for a two, three, or four year state prison sentence triad. Section 273.5, subdivision (f) states: "Any person convicted of violating this section for acts occurring within seven years of a previous conviction" for battery or assault with a deadly weapon, "shall be punished by imprisonment . . . in the state prison for two, four, or five years . . . ."

a conviction for the attempted offense, the enhanced penalty provision does not apply. (See, e.g., *People v. Finley* (1994) 26 Cal.App.4th 454, 458 [striking recidivist enhancement (§ 314, subd. (1)) where defendant pled guilty to attempted indecent exposure]; *People v. Bean* (1989) 213 Cal.App.3d 639, 643 [attempted petty theft with a prior conviction not a crime or subject to enhanced sentence].) "'[I]f the Legislature had intended to include attempts in the enhancement provisions, it would have specifically stated the enhancement applie[d] to the "commission or attempted commission" of specific crimes . . . .' [Citation.]" (*People v. Reed*, *supra*, at p. 1285.)

We modify the judgment on count 1 to reflect that appellant was convicted of attempted corporal injury on a child's parent (§§ 664/273.5, subd. (a)) and remand for resentencing. Pursuant to section 664, subdivision (a) and section 273.5, subdivision (a) the sentence triad of one year, 18 months, or two years applies. (See *People v. Lopez* (2003) 31 Cal.4th 1051, 1059 [persons guilty of attempting an offense must be sentenced to one-half the term of imprisonment prescribed upon a conviction of the offense attempted].)

Prior Strike

Appellant argues, and the Attorney General agrees, that the prosecution failed to establish that appellant personally inflicted great bodily injury on the victim when he was convicted in 2011 of battery with serious bodily injury (§ 243, subd. (d)). The record of conviction consists of a complaint alleging battery with serious bodily injury (§ 243, subd. (d)) and a serious felony enhancement, the plea form, the change-of-plea minute order, and the abstract of judgment. The minute order does not state

that appellant admitted the offense was a serious felony under section 1192.7.

Battery with serious bodily injury as described in section 243, subdivision (d) is only a serious felony if the defendant "personally inflicts great bodily injury on any person, other than an accomplice." (§ 1192.7, subd. (c)(8); see *People v. Rodriguez* (1998) 17 Cal.4th 253, 261-262; *People v. Bueno* (2006) 143 Cal.App.4th 1503, 1508.) Where the prosecution includes a serious felony allegation in the complaint and the defendant pleads guilty, section 969f, subdivision (a) requires that the defendant admit or deny the allegation. (*Id.* at p. 1509.) Here, the record of conviction fails to show that appellant admitted the serious felony allegation when the change of plea was entered. We accordingly reverse the trial court's finding that the 2011 conviction qualifies as a strike and remand for retrial and/or resentencing. (*Id.* at p. 1510; see, e.g., *People v. Gallardo* (2017) 4 Cal.5th 120, 138-139.)

Resentencing on Count 2 for Battery

On count 2 for misdemeanor battery (§ 243, subd. (e)), the trial court erred in staying the count pursuant to section 654 without imposing sentence. "A trial court must impose sentence on every count but stay execution as necessary to implement section 654." (*People v. Alford*, *supra*, 180 Cal.App.4th at p. 1472.) We remand for resentencing.

Pitchess Motion

Appellant requests that this court review the transcript of the in camera proceeding in which the trial court found there were no discoverable items in Officer Bustamante's personnel file. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) We have reviewed the sealed transcript of the proceedings and

conclude that the trial court did not abuse its discretion in denying discovery. (*People v. Hughes* (2002) 27 Cal.4th 287, 330; *People v. Mooc* (2001) 26 Cal.4th 1216, 1232.)

Disposition

We modify the judgment on count 1 to reflect that appellant was convicted of attempted corporal injury of a child's parent (§§ 664/273.5, subd. (a)) and remand for resentencing. On count 2 for battery (§ 273, subd. (d)), the trial court is directed to impose sentence and stay execution of the sentence pursuant to section 654. With respect to the prior strike, the prior strike finding is vacated and remanded for retrial and/or resentencing. As modified, the judgment of conviction is affirmed. (§ 1260.)

NOT TO BE PUBLISHED.

YEGAN, J.

I concur:

PERREN, J.

GILBERT, P. J., Concurring.

I concur with the ultimate result, but part company with my colleagues on the issue of custodial interrogation.

As the People acknowledge, "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." (*Stansbury v. California* (1994) 511 U.S. 318, 323.) The majority notes that sheriff's deputies detained and put appellant in the back of the patrol car. My independent review leads me to only one conclusion. A reasonable person in appellant's position would have understood he was not free to get out of the patrol car at any time, including the time Officer Bustamante arrived, with his seemingly innocuous question, "What's going on?"

It is true that the officers' subjective views of whether appellant was in custody are not determinative, yet it is noteworthy they believed appellant was in custody. Bustamante wrote in his police report that appellant was in custody, and he said that a sheriff's deputy at the scene told him that he had taken appellant "into custody without incident." The majority make light of this because there is no evidence appellant heard the remark, nor was appellant told he was under arrest. If trained officers think appellant was in custody under the circumstances here, it is objectively reasonable that appellant would arrive at the same conclusion.

And to the extent *In re Joseph R.* (1998) 65 Cal.App.4th 954 has some tenuous relevance to the facts here, a case the majority finds "factually distinguishable," I disagree with the majority's reasoning in *Joseph R.* The dissent in *Joseph R.* is persuasive.

I would exclude the statements appellant made to the officers at the scene and later at the police station under compulsion of *Missouri v. Seibert* (2003) 542 U.S. 600.

Yet I believe the error in admitting the admissions was harmless. The People outline the uncontradicted testimony of the witness. Her testimony that appellant slammed her face on the dashboard and pulled her hair was substantiated by the photographs of scratches on her face and neck and the damage to her car. This, coupled with numerous other incidents of domestic violence perpetrated by appellant against the victim, convinces me that, without the admissions of appellant, the result would have been the same under the *Chapman* standard. (*Chapman v. California* (1967) 386 U.S. 18.)

The jury found appellant not guilty of injury to a child's parent after a prior conviction, but guilty of the lesser-included offenses of attempted injury to a child's parent after a prior conviction, battery against a child's parent, and vandalism. This does not mean, as appellant suggests, the evidence concerning these offenses was weak. Nor does it show the victim was not credible. The charges the prosecution files to support its theory of liability are not necessarily the basis upon which to judge a witness's credibility.

NOT TO BE PUBLISHED.

GILBERT, P. J.

Olivia Rosales, Judge

Superior Court County of Los Angeles

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