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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ALLYN BRINKLEY, Defendant and Appellant.	B232354 (Los Angeles County Super. Ct. No. NA 080109)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joan Comparet-Cassani, Judge. Affirmed in part; reversed in part and remanded.

Alex Coolman, 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, Assistant Attorney General, Michael R. Johnsen and Lauren E. Dana, Deputy Attorneys General, for Plaintiff and Respondent.

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Allyn Brinkley appeals from the judgment entered following a jury trial that resulted in his conviction of assault with a deadly weapon (ADW; count 1) and making criminal threats while personally using a deadly and dangerous weapon (counts 3, 4). The court found that he had suffered two prior serious felony convictions, which also qualified as strikes under the three strikes law, and that he had served seven prior prison terms. Appellant was sentenced to prison to three consecutive indeterminate terms of 25 years to life for his convictions in counts 1, 3 and 4; plus a total determinate term of 12 years, consisting of, as to each of counts 3 and 4, the five-year serious felony and the one-year use enhancements. The court imposed a $10,000 restitution fine and a $10,000 parole revocation fine, which was stayed.

On appeal, appellant challenges the sufficiency of the evidence to support his ADW conviction. He contends the trial court abused its discretion in imposing a restitution fine in the amount of $10,000 and the fine constitutes cruel or unusual punishment. We conclude appellant's contentions are unsuccessful. The record reflects substantial evidence supports his ADW conviction. His claims of error as to the $10,000 restitution fine are forfeited by his acknowledged failure to object below.

We further conclude, however, the trial court committed sentencing error by failing to address the prior prison term findings, either by striking any prior prison term finding or imposing any prior prison term enhancement. This error mandates reversal of appellant's sentence and remand for the trial court to resentence appellant, specifically to resolve the prior prison term issues.

BACKGROUND

We review the evidence, both direct and circumstantial, in light of the entire record and must indulge in favor of the judgment all presumptions as well as every logical inference that the jury could have drawn from the evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396 (*Maury*); see also *People v. Carter* (2005) 36 Cal.4th 1114, 1156 (*Carter*); *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

On November 2, 2008, about 1:50 p.m., La Ronda Timmons and her 16-year-old daughter, Davonda Martin-Salter, were walking on Long Beach Boulevard in Long Beach

when appellant, who was near a bus stop, approached Martin-Salter and asked for a cigarette. Timmons told him her daughter was a minor and did not smoke cigarettes. Appellant became "really hysterical" and responded: "You fucking bitches; you niggers; fuck you." Removing a knife from his pocket, appellant swung the knife while continuing to cuss and make "racial comments." He repeatedly said, "I'll kill you, niggers" while swinging the knife towards Timmons and Martin-Salter.

As she spoke to appellant, Timmons pushed Martin-Salter behind her in an effort to protect her daughter. Timmons walked backward as appellant approached her, swinging his knife. The closest appellant got to Timmons was about four feet. Martin-Salter, who was about 12 feet away, was concerned appellant actually would kill Timmons.

Martin-Salter fled inside a nearby party shop. Timmons also fled inside and called 911. She reported a man had pulled a knife on her and her child and that he had pulled the knife from his pocket and called her "niggers and stuff."

When the police responded, the two victims were shaking, trembling and appeared scared. The police report reflected appellant said "fuck you nigger"; he pointed a knife at Timmons; and he walked towards her and her daughter as they tried to walk away. After advisements pursuant to *Miranda*,[1] appellant, who was seated at the bus stop and appeared angry, stated to police: "I didn't do nothing to those stupid niggers. Talk to my lawyer, asshole." Two knives were recovered during a search of appellant.

At trial, appellant denied making any racial slurs towards the victims and testified that he had no problem with "Black" people or anger or hatred toward them. He also denied pulling a knife on them or calling them "bitches" or "niggers." He was just trying to strike up a friendly conversation and simply said, "Ah, what's the matter? You don't like white guys?"

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

DISCUSSION

1. Substantial Evidence Supports ADW Conviction

Appellant contends the evidence is insufficient to support his ADW conviction, because his conduct in swinging a knife was not "likely" or "probably" to result in the application of force to Timmons, who at all times was at least four feet away from him. We disagree. Substantial evidence supports his ADW conviction.

"The law applicable to a claim of insufficiency of the evidence is well settled: '"In reviewing [a claim regarding] the sufficiency of the evidence, we must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.] '[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We '" presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."'" [Citation.] If we determine that a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt, the due process clause of the United States Constitution is satisfied [citation], as is the due process clause of article I, section 15, of the California Constitution [citation].' [Citations.]" (*Carter, supra,* 36 Cal.4th 1114, 1156.) This standard applies to both direct and circumstantial evidence. (*Maury, supra,* 30 Cal.4th 342, 396.)

Assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, § 240.)[2] To constitute an "assault," there must be a commission of an action that "by its nature will likely result in physical force on another." (*People v. Colantuono* (1994) 7 Cal.4th 206, 217.) In other words, an assault "by its nature will probably and directly result in the application of physical force against another." (*People v. Williams* (2001) 26 Cal.4th 779, 790.)

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[2] All further section references are to the Penal Code.

Appellant's narrow focus on the single fact he was never closer to Timmons than four feet fails to take into consideration the other facts before the jury. Appellant did not merely stand four feet away from Timmons. Rather, he advanced toward her while swinging a knife as she backed away. That she was able to escape from his dangerous advance into a nearby shop was simply fortuitous. In view of the totality of these circumstances, the jury was entitled to find, which it did, that appellant assaulted Timmons with a dangerous and deadly weapon. Substantial evidence thus supports appellant's ADW conviction. (See *People v. Wright* (2002) 100 Cal.App.4th 703, 707 [victim "forced to jump out of the crosswalk and into the traffic lane" to avoid being struck as defendant, who was about 30 feet away, deliberately drove within two to three feet of victim at "'a pretty good rate of speed'"].)

2. $10,000 Restitution Fine Claims of Error Unsuccessful

Appellant contends the trial court abused its discretion in imposing a $10,000 restitution fine, because the court acted out of "personal animosity" toward appellant, who is "homeless, indigent, and struggles with mental health challenges" (boldface and capitalization omitted), and, as unsupported by the record, this fine therefore constitutes cruel or unusual punishment (Cal. Const., art. I, § 17). We disagree.

In every case in which a defendant has been convicted of a felony, the trial court must impose a restitution fine, the minimum of which at the time was $200[3] and the maximum of which is $10,000. (§ 1202.4, subd. (b)(1).) In setting the amount of the fine, the court is required to consider such relevant factors as a defendant's inability to pay; the seriousness and gravity of the crime; the circumstances under which the crime was committed; the loss incurred; and the number of victims involved. The court is not required to make express findings as to the relevant factors, and the defendant bears the burden of demonstrating any inability to pay. (§ 1202.4, subd. (d).)

Appellant acknowledges no defense objection below was made as to the trial court's exercise of discretion in imposing this $10,000 restitution fine and concedes that ordinarily,

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[3] Defendant was sentenced on April 6, 2011. (See Stats. 2011, ch. 358, § 1 [minimum fine increased beginning on Jan. 1, 2012, and thereafter].)

such omission would be deemed a waiver on appeal under *People v. Scott* (1994) 9 Cal.4th 331, 351. He argues however this court is imbued with inherent authority to address his claims of error (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6) and urges this court to "do so because the fine is extreme and inappropriate when considered in light of appellant's overall situation."

The record does not disclose any extraordinary circumstances that would compel disregarding the rule of forfeiture[4] in this instance. Appellant cites various instances when the trial court interrupted appellant during his testimony and the court "scolded appellant and defense counsel for the fact that appellant mumbled to himself" and he characterizes the court's comments as "frequent and often gratuitous criticisms of appellant," which suggest "the court's assessment of the case became personal and vindictive rather than being grounded in an appropriate judicial demeanor." When viewed in context, as must be the case, however, the trial court's comments are well within the court's inherent authority and mandatory duty to control the trial proceedings to ensure the orderly administration of justice with the view to the expeditious and effective ascertainment of the truth of the matters at issue. (*People v. McKenzie* (1983) 34 Cal.3d 616, 626-627, abrogated on a different point in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365; *Cooper v. Superior Court* (1961) 55 Cal.2d 291, 301.) In one instance, for example, outside the jury's presence, the trial court stated on the record that defendant had been muttering throughout the testimony of Timmons and that he was "scaring her to death." The court had to admonish him not to intimidate the witnesses.

3. Reversal and Remand Regarding Prior Prison Term Findings

The information alleged that as to each count,[5] appellant had served seven prior prison terms within the meaning of section 667.5, subdivision (b). At the bifurcated trial on

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[4] Forfeiture is the correct concept although forfeiture and waiver are often used interchangeably. (*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6 [forfeiture when failure to make timely assertion of right while waiver when intentional relinquishment or abandonment of a known right].)

[5] The jury returned guilty verdicts as to counts 1, 3 and 4. The jury found appellant not guilty as to count 2.

the sentence enhancing and enhancement allegations, appellant admitted all allegations, and the trial court found them to be true.

At sentencing, the trial court neither imposed any prior prison term enhancement nor struck any of the prior prison term findings pursuant to section 1385. In fact, neither the court nor either of the parties even mentioned them.

Failure to strike a prior prison term finding or impose the enhancement is sentencing error, which mandates reversal of the sentence and remand for the trial court either to strike the finding(s) or impose the enhancement(s). (*People v. Bradley* (1998) 64 Cal.App.4th 386, 390-393, 400, fn 5.) Appellant's sentence thus must be reversed and the matter remanded for the trial to dispose of these prior prison term findings and resentence appellant accordingly. We point out that a prior prison term enhancement does not attach to a particular count, and thus, if the trial court exercises its discretion to impose an enhancement for a particular prior prison term finding, the court must do so only once and strike the superfluous findings as to the various counts. (See *People v. Smith* (1992) 10 Cal.App.4th 178, 181-183.)

DISPOSITION

The sentence imposed is reversed, and the matter is remanded for further proceedings in accordance with the views expressed in this opinion. In all other respects, the judgment is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.