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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Plaintiff and Respondent,

v.

JANICE HARVEY,

Defendant and Appellant.

B282358

(Los Angeles County
Super. Ct. No. TA141252)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Abzug, Judge. Affirmed in part, reversed in part with direction.

David W. Scopp, 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, Paul M. Roadarmel, Jr. and William N. Frank, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Janice Harvey appeals her conviction for assault with a deadly weapon. Defendant contends that (1) her fair trial rights were violated when the court inadvertently provided and then quickly retrieved two instructions and a verdict form on the bifurcated prior convictions proceeding, (2) her due process rights were violated when the court instructed the jury on flight, (3) insufficient evidence supported the section 667, subdivision (a) enhancements for prior convictions, (4) her right to trial by jury for the enhancements was violated, and (5) she lacked sufficient notice of the enhancement allegations. We reverse two of the enhancements, remanding only one for retrial. We affirm on all other grounds.

FACTS AND PROCEDURAL BACKGROUND

In accord with the usual rules of appellate review, we state the facts supporting defendant's conviction in a manner most favorable to the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 (*Ochoa*).)

1. Stabbing

Defendant, who is wheelchair bound, engaged in a verbal confrontation with two women on a train platform in Compton, Los Angeles. One of the women had an electroshock stun gun that she occasionally activated during the argument but did not use.¹ The woman pointed the weapon at defendant from about three feet away. Defendant moved her wheelchair backwards, turned away from the women, and drew a knife from her purse.

¹ This was the type of electroshock weapon where the user would need to physically touch the gun to the skin of the target to shock her. In contrast, a taser shoots darts attached to a wire at the target.

As defendant did so, defendant stated, “You guys have a stun gun. Let me show you what I’ve got.”

Victim Andre Brooks stood between defendant and the women. He told defendant, “Ma’am violence is not the answer.” In response, defendant repeated twice, “Oh, you are on their side, huh?” Defendant then stabbed Brooks in the leg.

Immediately after stabbing Brooks, defendant left the platform. Rather than board the arriving train, defendant moved with the flow of debarking passengers, quickly wheeled herself down a long ramp, continued across a pedestrian walkway over the tracks, and through a gate. By the time Brooks dialed 911, defendant had moved to a bus stop across a street near the station. Defendant had the knife when police arrested her nearby.

2. Charges and Trial

In a one-count amended information, defendant was charged with assault with a deadly weapon. The People further alleged that defendant had suffered four prior serious or violent convictions under the Three Strikes Law, four prior convictions of a serious felony within the meaning of section 667, subdivision (a)(1), and had served six prior prison terms without remaining free of prison custody for five years before committing a new offense that resulted in a felony conviction. Defendant pleaded not guilty and denied the special allegations.

In March 2017, defendant’s jury trial on the substantive offense (but not on the prior conviction enhancements) commenced. The People elicited testimony from victim Brooks and the police officer who arrested defendant. Over defense objection, the court allowed Brooks to testify that he saw defendant flee the scene of the crime and wheel herself to a bus

stop after the stabbing. Based on this testimony, the People argued flight to the jury, and the court instructed the jury on flight at defendant's request.

The exhibits the People introduced into evidence included a cell phone video taken by the victim showing defendant brandishing the knife, and a video captured by a surveillance camera on the train platform showing defendant stabbing the victim. Defendant testified on her own behalf, stating that she acted in self-defense. As part of an agreement with the People, who intended to impeach defendant's testimony with her prior offenses, defendant testified that she had been convicted of seven felonies.

After the court read the jury instructions and sent the jury into the deliberation room, it asked counsel to check the jury instructions and verdict forms to ensure that the packet going to the jury was correct. Neither counsel alerted the court to any inaccuracies. About 20 minutes later, the court clerk discovered that the packet of instructions in the jury's possession inadvertently included an instruction about the jury's duty in bifurcated trial proceedings, an instruction about defendant's prior convictions, and a verdict form regarding the prior convictions.

The first erroneously included jury instruction reiterated that the People are required to prove the prior conviction allegations beyond a reasonable doubt, and explained that the jury was tasked with considering solely the evidence presented in the subsequent phase of the bifurcated trial.

The second instruction read:

“The People have alleged that the defendant was previously convicted of other crimes. It has already been determined that the defendant is the

person named in exhibits. . . . Enhancement bifurcate exhibits. . . . You must decide whether the evidence proves that the defendant was convicted of the alleged crimes.

“The People allege that the defendant has been convicted of:

“1. A violation of 211, on October 5, 1990, in . . . Los Angeles, in Case number TA008911;

“2. A violation of 245(A)(1), on January 2, 2008, in . . . Los Angeles, in Case Number BA313763;

“3. A violation of 245(A)(1), on November 5, 2008, in . . . Los Angeles, in Case Number TA 008911;

“4. A violation of 417.8, on January 30, 2014, in . . . Los Angeles, in Case Number TA129850.

“In deciding whether the People have proved the allegations, consider only the evidence presented in this proceeding. Do not consider your verdict or any evidence from the earlier part of the trial.

“You may not return a finding that (the/any) alleged conviction has or has not been proved unless all 12 of you agree on that finding.”

The verdict form, which was erroneously and briefly provided to the jury, does not appear in the record. Based on our reading of the reporter’s transcript, the jury did receive a verdict form regarding defendant’s prior convictions based on the second instruction above. This verdict form was retrieved by the court along with the two erroneous instructions when the court realized the error.

The trial court brought the issue to the attention of counsel and stated that it did not know whether the jury had looked at the instructions and verdict form, or if it had, what, if any, conclusions the jurors may have drawn. The court further observed that the jury already knew that appellant had suffered seven felonies by her own admission.

Defense counsel moved the court to forego further inquiry into the matter: “I’m going to ask that no action be taken, and just that there were two instructions; the bifurcation instruction, as well as the verdict forms for each of the four priors that are alleged. [¶] I am just going to ask that the instructions that we send back at this point those two instructions are excised, but I’m not going to ask the court to make any inquiry of the jurors, nor am I going to ask for a mistrial.” The prosecutor observed that the instructions and verdict form had been in the jury room for only a “few minutes” and joined defense counsel’s motion that no additional action be taken other than removing the inapplicable instructions.

The trial court granted the joint motion, stating: “that is a sensible, tactical election by both of you under the unique circumstances of the situation. I don’t believe that I have any sua sponte duty to inquire, and indeed if I were, it may lead them to speculate about matters we don’t want them to speculate about. [¶] In any event, as I’ve said before, although it was unfortunate, their exposure to the jury instructions was exceedingly brief. The probability is that they looked at it for very, very remote in my view [*sic*], and the long and short of it is they already know because the defendant admitted it in open court that she had been convicted of seven felonies. [¶] The probability . . . that it will affect their deliberations in a way that is adverse to the defendant’s right to a fair trial is close to zero in my opinion, and so I find based on the record before me as to support no action.”

The jury found defendant guilty as charged. Defendant waived in writing a jury trial on the prior strike convictions. After a bench trial on the priors, the court found all four prior

conviction allegations to be true. The court granted defendant's motion to strike her prior strikes and prior one-year felony convictions.

The court denied probation and sentenced defendant to state prison for three years with four additional consecutive terms of five years each pursuant to Penal Code section 667, subdivision (a)(1).² The total sentence imposed was 23 years, with credit of 232 days of actual time served and 232 days of good time/work time.

DISCUSSION

1. The Jury's Brief Exposure to the Irrelevant Instructions Does Not Warrant Reversal

Defendant asserts that the trial court violated her right to a fair trial when it did not declare a mistrial or inquire further of the jury, after the jury was briefly exposed to the two irrelevant jury instructions and verdict form on defendant's prior felony convictions. Defense counsel specifically asked the trial court not to inquire further of the jury on this issue and not to declare a mistrial. To the extent defendant makes arguments about these instructions on appeal, she forfeited this issue by affirmatively and expressly requesting the trial court take no action during the jury deliberations (other than removing the erroneous instructions). (*People v. Saunders* (1993) 5 Cal.4th 580, 589–590 [defendant's failure to object precludes his obtaining appellate relief based on an error committed by the trial court].)

Defendant attempts to salvage this issue by arguing that her attorney's decision amounted to ineffective assistance of counsel. To succeed on an ineffective assistance of counsel claim,

² All subsequent statutory references are to the Penal Code unless indicated otherwise.

“the defendant must show that counsel’s action or inaction was not a reasonable tactical choice.” (*People v. Jones* (2003) 30 Cal.4th 1084, 1105.) In most cases, the record does not reveal counsel’s reasoning. (*Ibid.*) “[U]nless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,’ the claim on appeal must be rejected.” (*People v. Wilson* (1992) 3 Cal.4th 926, 936.)

Here, there is a strategic explanation for defense counsel’s actions. As noted by the trial court, the jury’s possible exposure to the instructions and verdict form was exceedingly brief. Asking the court to inquire further, or asking the court to declare a mistrial (which likely would have compelled the court to inquire further of the jury), would draw the jury’s attention to documents they only briefly had in their possession and might not have read at all. As the trial court observed, further inquiry “may lead [the jury] to speculate matters we do not want them to speculate about.” The trial court described counsel’s motion as “a sensible, tactical election . . . under the unique circumstances of the situation.” We agree. As the circumstances of this case demonstrate a reasonable tactical choice by counsel, defendant cannot succeed on a claim for ineffective assistance of counsel.

2. The Trial Court Did Not Violate Defendant’s Due Process Rights by Instructing the Jury on Flight

Defendant contends that the trial court violated her due process rights by instructing the jury on flight without sufficient evidence to support the instruction. “Errors in jury instructions are questions of law, which we review de novo.” (*People v. Jandres* (2014) 226 Cal.App.4th 340, 358.) “A flight instruction is proper whenever evidence of the circumstances of [a] defendant’s departure from the crime scene . . . logically permits

an inference that his movement was motivated by guilty knowledge.’” (*People v. Abilez* (2007) 41 Cal.4th 472, 522.)

Here, the court instructed the jury: “If the defendant fled, or tried to flee immediately after the crime was committed, that conduct may show she was aware of her guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself.” (CALCRIM No. 372.)

Substantial evidence supports the court’s instruction. Witness testimony established that immediately after stabbing Brooks, defendant left the platform. Rather than board the arriving train, defendant moved with the flow of debarking passengers, quickly wheeled herself down a long ramp, continued across a pedestrian walkway over the tracks, and through a gate. By the time Brooks dialed 911, defendant had moved to a bus stop across a street near the station. This is sufficient evidence to show defendant departed from the crime scene because of her consciousness of guilt.

Defendant claims the evidence is insufficient because she did not get far from the scene of the crime. Flight does not require that defendant physically run away or that she reach a refuge. Flight only requires movement to avoid being observed or arrested. (*People v. Abilez, supra*, 41 Cal.4th at p. 522.) The evidence described above is sufficient to support the inference that defendant left the platform to avoid arrest.

To the extent defendant argues the distance was insufficient to show flight or offers alternative explanations for leaving the train platform, that evidence was for the jury to weigh, but not relevant to our inquiry on appeal. (See *People v.*

Richardson (2008) 43 Cal.4th 959, 1020 [“The evidentiary basis for the flight instruction requires sufficient, not uncontradicted, evidence.”].)

3. No Cumulative Error

Defendant contends that the trial court’s cumulative errors prejudiced her right to a fair trial. As we have found no error, we do not address this contention further. (*In re Reno* (2012) 55 Cal.4th 428, 483.)

4. Insufficient Evidence Supports Two of the Section 667, Subdivision (a)(1) Enhancements

Defendant was charged with and convicted of four five-year enhancements pursuant to section 667, subdivision (a)(1). Defendant contends that the evidence is insufficient to support three of the four section 667 subdivision (a)(1) prior conviction enhancements. The People agree that two of the three challenged enhancements are not supported by sufficient evidence.

We review the court’s serious felony findings for sufficient evidence. (*Ochoa, supra*, 6 Cal.4th at p. 1206; *People v. Cortez* (1999) 73 Cal.App.4th 276, 279.) “The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’” (*Ochoa*, at p. 1206.)

For the five-year enhancement to be imposed under section 667, subdivision (a)(1), the People were required to prove, among other things, that defendant committed a “serious felony,” as

defined by “subdivision (c) of Section 1192.7.” (§ 667, subd. (a)(1)&(4).) Section 1192.7, subdivision (c) provides a list of 42 crimes that are serious felonies. “Section 1192.7, subdivision (c), lists some felonies that are per se serious felonies, such as murder, mayhem, rape, arson, robbery, kidnapping, and carjacking. If a defendant’s prior conviction falls into this group, and the elements of the offense have not changed since the time of that conviction, then the question whether that conviction qualifies as a serious felony is entirely legal.” (*People v. Kelii* (1999) 21 Cal.4th 452, 456.) “However, if the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense. [Citations.] In such a case, if the serious felony nature of the prior conviction depends upon the particular conduct that gave rise to the conviction, the record is insufficient to establish that a serious felony conviction occurred.” (*People v. Miles* (2008) 43 Cal.4th 1074, 1083.)

Here, the evidence in support of the four prior convictions consisted of a “section 969b packet,” which included abstracts of judgment, fingerprint cards, a chronological movement history, and a photograph of defendant. Defendant contends the packet was insufficient to support enhancements based on: (1) the 2001 conviction for grand theft under section 487, subdivision (d); (2) the 2014 conviction for resisting arrest with a firearm; and (3) the 2008 conviction for assault with a deadly weapon or by means of force likely to produce great bodily injury under section

245, subdivision (a)(1).³ The People concede that the enhancements based on the grand theft and resisting arrest convictions were not supported by sufficient evidence. We address the three convictions in turn.

(a) Grand Theft Conviction

The section 969b packet indicates that defendant was convicted of grand theft under section 487, subdivision (d) in 2001. Under former section 487, subdivision (d) (as it existed in 2001), grand theft could be committed by stealing a firearm, certain animals, or an automobile. Under section 1192.7, subdivision (c)(26), the only qualifying grand theft offense for the enhancement is the theft of a firearm.

At defendant's request, this court took judicial notice of the record of her grand theft conviction. (See Evid. Code, §§ 452, 459.) The transcript of defendant's plea agreement for the conviction reveals that defendant pleaded "no contest" to unlawfully taking a car, specifically "a 1978 Datsun." The probation officer's report likewise states that defendant committed grand theft auto. The evidence shows that defendant's grand theft charge is not a qualifying offense under 1192.7, subdivision (c)(26); accordingly, we reverse this enhancement. (See *People v. Reed* (1996) 13 Cal.4th 217, 223 [truth of prior conviction proven with record of conviction]; *People v. Smith* (1988) 206 Cal.App.3d 340, 345 [sentencing transcript part of record of conviction].)

Because the record of the prior grand theft conviction shows unequivocally the prior was not a serious felony, we direct

³ Defendant does not make any arguments regarding the enhancement based on her conviction for robbery, which was the fourth offense relied on by the People in seeking enhancements.

the trial court to enter a finding of “not true.” Unlike those situations where the evidence is only legally insufficient and the People on remand may retry the alleged prior (see *People v. Barragan* (2004) 32 Cal.4th 236, 239; *People v. Monge* (1997) 16 Cal.4th 826, 829), here the record affirmatively shows the prior was not true. Retrial is not appropriate in this situation.⁴

(b) Resisting Arrest Conviction

Similarly, resisting arrest under section 417.8 could be committed by personally drawing or exhibiting a firearm or a deadly weapon with the intent to resist a peace officer, or by aiding and abetting someone in doing so. However, only the personal use of the deadly weapon qualifies this offense for the enhancement under section 1192.7, subdivision (c)(8) and (23). The section 969b packet does not distinguish whether defendant used the deadly weapon personally or whether her liability was based on aiding and abetting the principal. Insufficient evidence likewise supported this enhancement.

Unlike the enhancement based on the grand theft auto conviction, there is no evidence on appeal indicating defendant’s conviction was for aiding and abetting that would obviate the need for retrial. We therefore remand for retrial of the section 677, subdivision (a)(1) allegation based on the section 417.8 prior conviction. (*People v. Barragan, supra*, 32 Cal.4th at pp. 239–241

⁴ We agree with respondent that the “not true” finding should be entered on remand by the trial court which may reconsider its sentencing choices in light of the not true finding. (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1256–1258 [on remand, trial court may restructure sentence “subject only to the limitation that the aggregate prison term could not be increased”].)

[retrial of prior strike allegations is proper following reversal for insufficient evidence].)

(c) Assault with a Deadly Weapon Conviction

Former section 245, subdivision (a)(1), as it existed at the time of defendant's conviction in 2008, proscribed assault upon the person of another either with a deadly weapon or instrument other than a firearm, or by any means of force likely to produce great bodily injury. Under section 1192.7, subdivision (c)(31), assault with a deadly weapon is a qualifying offense, but assault by means of force likely to produce great bodily injury is not.

The People argue sufficient evidence in the record supported a finding that defendant committed assault with a deadly weapon. The People point out that "the abstract of judgment and F.B.I. [Federal Bureau of Investigation] fingerprint card referenced only a section 245 offense concerning a deadly weapon or instrument." The abstract of judgment states "ASSAULT W DEADLY WEAPON" and lists November 5, 2008 as the date of conviction.⁵ Similarly, the F.B.I. record notes the 2008 conviction as "P245(A)(1) ASLT W/ D (B) WPN."

Defendant argues that this evidence is insufficient to show defendant's assault involved a deadly weapon. Defendant asserts that in using the abstract of judgment and the F.B.I. fingerprint card to conclude a deadly weapon was used in commission of the crime, the court went beyond a reasonable inference and weighed

⁵ Defendant makes much of the fact "INSTR" is written on the line below the assault with a deadly weapon conviction. She says that this creates ambiguity. Yet, these letters do not appear on the line with the conviction's notation and in no way appear to refer to the great bodily injury version of this crime.

the evidence contained in those documents to make a factual determination about the nature of the offense. We disagree.

In *People v. Delgado* (2008) 43 Cal.4th 1059, 1064 (*Delgado*), like in this case, the prosecution introduced into evidence an abstract of judgment to prove a prior serious felony. The abstract described a conviction of violating section 245, subdivision (a)(1), as an “‘Asslt w DWpn.’” (*Ibid.*) The court found the evidence to be a reliable official record sufficient to support a finding that the conviction was for the serious felony of assault with a deadly weapon. (*Id.* at pp. 1069–1070.) The *Delgado* Court distinguished its conclusion from the holding in *People v. Banuelos* (2005) 130 Cal.App.4th 601 (*Banuelos*), which defendant cites for support. In *Banuelos*, the court reversed the enhancement because the abstract of judgment indicated both great bodily injury and use of a deadly weapon. (*Id.* at p. 606.) The *Delgado* Court explained that unlike the evidence in *Banuelos*, “the instant abstract does not mention the other specific, discrete, and disjunctive form of section 245(a)(1) violation, involving force likely to produce [great bodily injury].” (*Delgado, supra*, at p. 1069.)

Likewise here, the abstract of judgment solely indicated that defendant committed the assault with a deadly weapon. The abstract made no mention of great bodily injury. We thus affirm the court’s true finding of the enhancement based on the assault with a deadly weapon conviction.

5. The Trial Court Did Not Violate Defendant’s Right to Trial by Jury on the Enhancements

Citing *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*), defendant asserts that the trial court violated her Sixth Amendment right to trial by jury when it engaged in “fact-finding

beyond the elements of the offenses.” In *Gallardo*, the People alleged that the defendant suffered a prior strike based on an assault conviction under a pre-2012 version of section 245. (*Id.* at p. 123.) Following a bench trial on the enhancement, the court found the allegation true. However, the court’s “sole basis for concluding that defendant used a deadly weapon was a transcript from a preliminary hearing.” (*Id.* at p. 136.) The California Supreme Court concluded the trial court had engaged in constitutionally prohibited factfinding because it looked beyond defendant’s record of conviction to find that the assault was committed with a deadly weapon. (*Id.* at pp. 134–137.)

The Supreme Court held: “The trial court’s role is limited to determining the facts that were necessarily found in the course of entering the conviction. To do more is to engage in ‘judicial factfinding that goes far beyond the recognition of a prior conviction.’” (*Gallardo, supra*, 4 Cal.5th at p. 134.) Thus, “a court considering whether to impose an increased sentence based on a prior qualifying conviction may not determine the ‘nature or basis’ of the prior conviction based on its independent conclusions about what facts or conduct ‘realistically’ supported the conviction. [Citation.] That inquiry invades the jury’s province by permitting the court to make disputed findings about ‘what a trial showed, or a plea proceeding revealed, about the defendant’s underlying conduct.’ [Citation.] The court’s role is, rather, limited to identifying those facts that were established by virtue of the conviction itself—that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea.” (*Gallardo*, at p. 136, fn. omitted.) The Supreme Court concluded that “determinations about the nature of prior convictions are to be

made by the court, rather than a jury, based on the record of conviction.” (*Id.* at p. 138.) A record of conviction does not include preliminary hearing transcripts. (*Id.* at pp. 136–137.)

In contrast, the court here limited its inferences about the assault with a deadly weapon conviction to information in defendant’s record of conviction. As explained in *Delgado, supra*, 43 Cal.4th at page 1070, an abstract of judgment is an “officially prepared clerical record of the conviction and sentence.” In the absence of rebuttal evidence, an “officially prepared abstract of judgment that clearly describes the nature of the prior conviction” is presumed reliable and accurate. (*Id.* at pp. 1070–1071.) If the abstract describes a qualifying offense, it constitutes prima facie evidence that a qualifying conviction occurred. (*Id.* at pp. 1066, 1070.) Here, there was prima facie evidence of the qualifying offense in the abstract of judgment for the assault conviction.

**6. Defendant Had Fair Notice of Section 667,
Subdivision (a)(1) Allegations**

“Due process requires that an accused be advised of the specific charges against [her] so [s]he may adequately prepare [her] defense and not be taken by surprise by evidence offered at trial.” (*People v. Haskin* (1992) 4 Cal.App.4th 1434, 1438 (*Haskin*).)

Defendant contends that she did not receive fair notice that the People were seeking to enhance her sentence pursuant to section 667, subdivision (a)(1), based on her November 2008 conviction for assault with a deadly weapon and January 2014 resisting arrest conviction.⁶

⁶ Because we reverse the section 667, subdivision (a)(1) for grand theft and conclude that it is not subject to retrial, we do

Here, the information alleged that defendant suffered her assault with a deadly weapon conviction in July 2008 and a resisting arrest conviction in February 2014. The dates were incorrect. Shortly before trial, the information was amended by interlineations to reflect that the date of the prior assault conviction was actually November 5, 2008 and the prior resisting arrest conviction was January 30, 2014. Defendant did not object to the prosecution's motion to amend the information to correct the dates. Defendant thus was given express notice of the November 5, 2008 assault prior and the January 30, 2014 resisting arrest prior.

As to the assault prior, defendant contends that the information did not properly put defendant on notice because the information did not specifically identify the deadly weapon prong of section 245, subdivision (a). Defendant is correct on her facts but not on their legal effect. Defendant relies on *Haskin, supra*, 4 Cal.App.4th 1434 for support. In *Haskin*, the defendant admitted the charged one-year enhancement under section 667.5, subdivision (b) based on a burglary conviction. In taking this plea, the trial court found that the information in the burglary case alleged that defendant entered a residence, and sentenced defendant, over his objection, to a five-year enhancement for a serious felony prior under Penal Code section 667 as burglary of a residence was a qualifying offense. (*Id.* at p. 1437.) On appeal, the court found no consent to the greater enhancement because defendant was not statutorily or factually charged with the greater enhancement and did not consent to its substitution for the one-year enhancement. (*Id.* at p. 1440.)

not address defendant's arguments that the true finding for that prior violated her due process right to notice.

Unlike *Haskin*, the information in this case alleged that defendant was charged with a section 667, subdivision (a)(1) enhancement for her November 2008 conviction for violation of section 245, subdivision (a). The only conviction under section 245, subdivision (a) that could qualify for the serious felony gang enhancement was one involving a deadly weapon.

Defendant also argues that she had insufficient notice of the resisting arrest prior because “the information did not allege that [defendant] personally committed the crime and because it was charged under case No. TA129850 but was found true under case No. BA129850.” Like with the assault prior, the only conviction under section 417.8 that qualifies for the enhancement involves personal use of a deadly weapon. Contrary to defendant’s contentions, the charging document identified case No. TA129850, and the trial court expressly found the prior true, referencing “TA129850.” The charging document adequately placed defendant on notice.

DISPOSITION

We remand for retrial of the section 667, subdivision (a)(1) allegation on the resisting arrest prior conviction. We order the trial court to strike the section 667, subdivision (a)(1) allegation

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on the grand theft prior conviction. We also remand for resentencing. The judgment is affirmed on all other grounds.

RUBIN, Acting P.J.

WE CONCUR:

GRIMES, J.

DUNNING, J.*

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.