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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DEONDRE A. SMITH,

Defendant and Appellant.

2d Crim. No. B276647  
(Super. Ct. No. BA420012)  
(Los Angeles County)

Deondre A. Smith appeals from the judgment entered following this court's remand for retrial of prior strike and prior serious felony enhancement allegations (Pen. Code, §§ 667, subds. (a)-(j), 1170.12)<sup>1</sup> attendant to a conviction of second degree robbery (§ 211). On retrial, the trial court found the allegations to be true and resentenced appellant to 11 years in state prison. Appellant contends that the subject true findings must once again be reversed for insufficient evidence. We shall order the

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

judgment amended to reflect the imposition and staying of a prior prison term enhancement (§ 667.5, subd. (b), hereinafter § 667.5(b)). Otherwise, we affirm.

#### FACTS AND PROCEDURAL HISTORY

Appellant was charged by information with second degree robbery (§ 211). The charge included allegations that appellant had suffered a prior conviction, i.e., a 2012 conviction in case number GA07322 of battery with serious bodily injury (§ 243, subd. (d)), that qualified as both a serious felony and a strike. It was further alleged that appellant had served three prior prison terms (§ 667.5(b)), the third of which was based on his 2012 conviction of battery with serious bodily injury.<sup>2</sup>

Appellant waived his right to a jury trial on the special allegations. After a jury convicted him of robbery, the court granted the prosecution's motion to dismiss the second section 667.5(b) allegation. Following a court trial on the remaining prior conviction and prison prior allegations, the court found them all to be true. Appellant was sentenced to 12 years in state prison, consisting of the midterm of 3 years for the robbery, doubled for the strike prior, plus 5 years for the prior serious felony under section 667.5, subdivision (a), plus a one-year enhancement for the first section 667.5(b) prison prior, which was based on a 2007 conviction for grand theft (§ 487, subd. (c)). The third section 667.5(b) prior (which was based on the same conviction as the prior serious felony and strike allegations) was imposed and stayed pursuant to section 654.

In the appeal from the original judgment, we affirmed appellant's robbery conviction and the true findings on

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<sup>2</sup> On our own motion, we take judicial notice of the record in the first appeal.

the three prison prior allegations. (*People v. Smith* (Dec. 17, 2015, B257220) [nonpub. opn.].) Pursuant to the People’s concession, we reversed the true findings on the prior strike and serious felony conviction allegations for insufficient evidence and remanded for retrial of those allegations. (*Ibid.*)

At the second trial, the transcript of the preliminary hearing in appellant’s 2012 battery case was admitted into evidence. At the conclusion of the trial, the court again found the allegations to be true, struck the previously-imposed one-year prison prior (on the ground that the underlying grand theft conviction had been reduced to a misdemeanor under Proposition 47), and resentenced appellant to 11 years in state prison. The court’s order made no mention of the previously imposed and stayed one-year enhancement on the third section 667.5(b) prison prior.

## DISCUSSION

### *Sufficiency of the Evidence*

Appellant contends the evidence on retrial was once again insufficient to prove that his prior conviction of battery with serious bodily injury (§ 243, subd. (d)) qualifies as both a prior serious felony and a strike. We disagree.

Battery with serious bodily injury does not qualify as a serious felony under section 1192.7 (and thus a strike under sections 667 and 1170.12) unless the prosecution proves, as relevant here, that in committing the offense the defendant “personally inflict[ed] great bodily injury on any person, other than an accomplice.” (§ 1192.7, subd. (c)(8); *People v. Bueno* (2006) 143 Cal.App.4th 1503, 1508; *People v. Rodriguez* (1998)

17 Cal.4th 253, 261.)<sup>3</sup> In the first trial, the prosecution merely offered evidence of the prior conviction but not of the facts underlying the offense. In the first appeal, the People conceded that evidence of the underlying facts was essential to prove the crime qualified as a serious felony and a strike. According to appellant, however, “the prosecution presented essentially the same evidence” on retrial. Although he acknowledges the prosecutor asked the court to take judicial notice of the transcript of the preliminary hearing in the battery case, he asserts that “[t]he transcript was not admitted into evidence.”

The record belies this assertion. At the beginning of the second trial, the preliminary hearing transcript from the 2012 battery case (case no. GA087322) was marked as People’s Exhibit No. 1 and was offered for admission into evidence. Moreover, the reporter’s transcript reflects that People’s Exhibits 1 through 4 were all admitted into evidence at the conclusion of the prosecution’s case. Although the court’s minute order only refers to exhibits 2 through 4 being admitted, the reporter’s transcript controls. (See *In re Merrick V.* (2004) 122 Cal.App.4th 235, 249 [“Conflicts between the reporter’s and clerk’s transcripts are generally presumed to be clerical in nature and are resolved in favor of the reporter’s transcript unless the particular circumstances dictate otherwise”].)

The preliminary hearing transcript was admissible to prove that for which it was offered, i.e., that appellant personally inflicted great bodily injury on someone other than an accomplice

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<sup>3</sup> “Great bodily injury” and “serious bodily injury” are substantially the same. (*People v. Johnson* (2016) 244 Cal.App.4th 384, 396.)

in committing the battery.<sup>4</sup> (*People v. Reed* (1996) 13 Cal.4th 217, 223; *People v. Thoma* (2007) 150 Cal.App.4th 1096, 1101.) Moreover, the battery victim testified that appellant punched her in the head and mouth, knocking out several of her teeth and causing her to briefly lose consciousness. This evidence is sufficient to make the requisite showing. (See § 12022.7, subd. (f) [defining great bodily injury as “a significant or substantial physical injury”].)

*Previously-Stayed Prison Prior (§ 667.5(b))*

The People contend the matter must be remanded for resentencing on the previously-stayed section 667.5(b) prison prior. They assert that the court was required to either impose or strike the enhancement in resentencing appellant and urge us to remand “so the trial court can make a decision whether to continue the stay on the prison prior or impose its one-year prison sentence.” (Citation omitted.)

We conclude that remand is unnecessary. Because the trial court once again found that appellant’s 2012 battery conviction qualified as a serious felony and thus imposed a five-year sentence enhancement under subdivision (a) of section 667, it would have no authority but to once again impose and stay the section 667.5(b) enhancement that is based on the same conviction. (See, e.g., *People v. Brewer* (2014) 225 Cal.App.4th 98, 103-106; Cal. Rules of Court, rule 4.447.) Because a remand for resentencing would serve no meaningful purpose, in the interests of judicial economy we shall simply order the judgment amended accordingly.

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<sup>4</sup> After appellant filed his opening brief, we granted the People’s motion to augment the record on appeal to include the transcript.

### DISPOSITION

The judgment is amended to reflect an imposed and stayed one-year enhancement under section 667.5(b). The superior court clerk shall prepare an amended abstract of judgment and forward and copy to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Curtis B. Rappe, Judge  
Superior Court County of Los Angeles

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