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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

GERALD THEODORE SMITH,

Defendant and Appellant.

B279363

(Los Angeles County
Super. Ct. No. PA085964)

APPEAL from judgment of the Superior Court of Los Angeles County, Hilleri G. Merritt, Judge. Reversed in part and remanded for further proceedings.

Patricia A. Scott, 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, Senior Assistant Attorney General, Margaret E. Maxwell and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

Gerald Theodore Smith was convicted by a jury of assault with a deadly weapon. In a bifurcated bench trial the court found Smith had suffered a prior conviction in Oklahoma that qualified as a serious felony under California's three strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12)¹ and section 667, subdivision (a)(1). Smith was sentenced to an aggregate state prison term of 11 years.

On appeal Smith contends the trial court erred in finding the prior Oklahoma conviction for kidnapping constituted a serious or violent felony under California law. We reverse in part and remand for further proceedings.²

PROCEDURAL BACKGROUND

In a second amended information filed November 7, 2016 Smith was charged with two counts of forcible rape (§ 261, subd. (a)(2)). It was specially alleged that Smith had been convicted of a prior serious or violent felony (kidnapping) in Oklahoma on March 24, 1977. The second amended information was amended by interlineation during trial to add a count of assault with a deadly weapon (§ 245, subd. (a)(1)). The jury found Smith guilty of assault with a deadly weapon but not guilty on the rape counts.³

¹ Statutory references are to the Penal Code unless otherwise stated.

² Smith also appeals the trial court's denial of his motion to dismiss the prior strike conviction (see *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497) and asks that this court correct an error in the abstract of judgment. In light of our reversal and remand for further proceedings, these issues are moot.

³ According to the evidence at trial pertaining to the charge of assault, Smith met Tammy K., a homeless woman, in March

At the bifurcated bench trial following Smith's conviction, the People introduced two criminal history reports, one from the Los Angeles County Consolidated Criminal History System and another from the California Law Enforcement Telecommunication System (CLETS). The CLETS report showed Smith had pleaded guilty to kidnapping in Oklahoma in 1977 and had been sentenced to three years in prison. The People also presented certified documents from the record of conviction in Oklahoma, including a "Preliminary Information," "Judgment and Sentence on Conviction" signed by an Oklahoma district judge, and a "Pre-Sentence Investigation" report. A printout of the Oklahoma kidnapping statute as of the date of the Oklahoma conviction was also submitted.

Following argument by counsel, the trial court found the Oklahoma conviction for kidnapping to be true and ruled it qualified as a prior serious or violent felony under the three strikes law and section 667, subdivision (a)(1). Smith was

2016 and invited her to his apartment for dinner. Smith testified they had consensual sex that night and on two more occasions the following week. Tammy testified there was no sexual contact between them the night they met. She said Smith offered to help her if she ever needed anything. A few days after they met Tammy contacted Smith and asked if she could visit his apartment to dye her hair. Smith agreed. Tammy testified Smith began acting strangely while she was dyeing her hair and ultimately threatened her with a BB gun, which he fired in the air. She said Smith then hit her with the BB gun, pushed her, strangled her until she lost consciousness and raped her. Smith admitted to lightly pushing Tammy and pointing the BB gun at her during an argument; but he denied firing the gun, strangling Tammy and raping her. Smith does not challenge the jury's conviction for aggravated assault.

sentenced as a second strike offender to an aggregate state prison term of 11 years: double the middle term of three years, plus five years for the prior serious felony enhancement.

DISCUSSION

1. *Governing Law and Standard of Review*

A prior conviction from another jurisdiction constitutes a strike under the three strikes law if the offense includes all of the elements of a violent or serious felony as described in sections 667.5, subdivision (c), or 1192.7, subdivision (c). (§§ 667, subd. (d)(2), 1170.12, subd. (b)(2).) Likewise, section 667, subdivision (a)(1), provides for a five-year sentence enhancement for each prior conviction for “any offense committed in another jurisdiction which includes all of the elements of any serious felony” under California law when the current offense is also a serious felony. Thus, to trigger the sentencing provisions of the three strikes law and section 667, subdivision (a)(1), the out-of-state conviction “must involve conduct that would qualify as a serious felony in California.” (*People v. Avery* (2002) 27 Cal.4th 49, 53.) “To make this determination, the court may consider the entire record of the prior conviction as well as the elements of the crime.” (*Ibid.*) If the record does not sufficiently reveal the facts of the prior offense, the court must presume the prior conviction was for the least offense punishable under the foreign law. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 261-262; see also *People v. Trujillo* (2006) 40 Cal.4th 165, 180 [“in determining the nature of a prior conviction, the court may look to the entire record of conviction, ‘but no further’”].)

“On review, we examine the record in the light most favorable to the judgment to ascertain whether it is supported by

substantial evidence. In other words, we determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt.” (*People v. Miles* (2008) 43 Cal.4th 1074, 1083; accord, *People v. Delgado* (2008) 43 Cal.4th 1059, 1067; see also *People v. Riel* (2000) 22 Cal.4th 1153, 1205 [to uphold prior prison term enhancement, “we need find sufficient evidence only as to one of the [prior] convictions”]).⁴

2. *The Trial Court Erred in Finding Smith’s Oklahoma Conviction for Kidnapping Constituted a Violent or Serious Felony Under California Law*

Kidnapping under California law is a serious or violent felony within the meaning of the three strikes law and section 667, subdivision (a)(1). (§§ 667.5, subd. (c)(14), 1192.7, subd. (c)(20).) Under section 207, subdivision (a), “[e]very person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping.” An

⁴ Citing *People v. Kelii* (1999) 21 Cal.4th 452, Smith asserts we should review de novo the question whether an out-of-state conviction qualifies as a serious or violent felony. In *Kelii* the Supreme Court considered whether a jury or the trial court should determine if a prior conviction qualifies as a serious felony for purposes of the three strikes law. The Court held the question is for the court to decide. (*Id.* at p. 454.) Smith apparently extrapolates from that holding the proposition that the question is one of law, subject to de novo review. Smith’s reading of *Kelii* is inconsistent with the more recent and explicit statements from the Supreme Court discussed in text.

essential element of the crime is “movement of the victim ‘for a distance that is substantial in character.’” (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1319.) In deciding whether the distance a victim was moved was substantial in character, the fact finder must consider the totality of the circumstances, including the actual distance moved, as well as “whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim’s foreseeable attempts to escape and the attacker’s enhanced opportunity to commit additional crimes.” (*People v. Martinez* (1999) 20 Cal.4th 225, 237; accord, *People v. Arias* (2011) 193 Cal.App.4th 1428, 1434-1435.)

The People proved Smith’s 1977 conviction for kidnapping in Oklahoma with records showing the existence, date and statutory authority for the conviction. Smith does not challenge the trial court’s finding he was the individual who suffered the Oklahoma kidnapping conviction, but argues the court erred in ruling the conviction qualified as a serious or violent felony under California law. Specifically Smith contends there was not substantial evidence in the record from which the court could conclude the Oklahoma victim was moved a substantial distance.

In Oklahoma at the time of the events underlying Smith’s conviction, kidnapping was committed when a person “without lawful authority, forcibly seizes and confines another, or inveigles or kidnaps another” with intent to cause the victim to be secretly confined or imprisoned within Oklahoma against his or her will, to cause the victim to be sent out of Oklahoma against his or her will or to cause the victim to be sold as a slave or in any way held to service against his or her will. (Former Okla. Stat. tit. 21,

§ 741.) There was no movement required. The offense was established if the victim was merely confined. (See *Turner v. State* (Okla.Crim.App. 1990) 786 P.2d 1251, 1254-1255 [“Appellant argues that without some overt asportation of the victim there can be no confinement. . . . [W]e have not previously imposed such a requirement. We are not inclined to make such a pronouncement in this case.”].)

The record of Smith’s Oklahoma conviction submitted to the trial court contains little factual information about the crime. The preliminary information states Smith and an accomplice “did unlawfully, feloniously and willfully . . . forcibl[y] seize, kidnap and confine one [Debbie M.] from a place in Tulsa County, Oklahoma, to-wit: 547 N. Cheyenne, Apt. #3, with the unlawful and felonious intent . . . to cause the said [Debbie M.] to be secretly confined and imprisoned in this State against her will.” The presentence investigation report repeats this description of the crime verbatim. Nothing in the record of the trial court proceedings contains further elucidation of Smith’s actions.

Based on this evidence the trial court concluded Smith had moved the victim during the commission of the robbery and, therefore, the elements of kidnapping in California had been met. The court relied on the use of the word “from” in the information and presentence investigation, explaining, “They forcibly seized, kidnapped and confined the victim from a place, and it gives an apartment, and it says from a place. So seizing from a place actually would seem to actually satisfy the asportation element of kidnap here in California.” “[T]here is a degree of specificity given within this report. . . . It gives the details of where it occurred, the name of the victim, where she was taken from”

The trial court erred by relying solely on the word “from” to satisfy the asportation element of kidnapping as defined in California. Use of that word, without more, does not constitute substantial evidence that Smith physically moved the victim from the apartment where he had seized her. The choice of a particular preposition without more detail of the underlying behavior, let alone identification of a place to which the victim was moved, is too vague to adequately establish there was movement from the place of seizure. Likewise, there is no evidence regarding any of the factors considered to determine whether the movement was substantial in character, such as the distance moved, whether the movement increased the victim’s risk of harm or decreased the likelihood of detection. (See *People v. Martinez, supra*, 20 Cal.4th at p. 237.) Thus, the evidence presented to the trial court does not support a finding of movement. The ruling this offense constituted a serious or violent felony for sentencing purposes must be reversed.

3. *The Prior Strike and Prior Serious Felony Allegations May Be Retried*

As the People argue, and Smith concedes, there is no double jeopardy bar to a retrial on a prior conviction allegation in a noncapital sentencing proceeding. (*People v. Barragan* (2004) 32 Cal.4th 236, 239 [retrial of strike allegation permissible when trier of fact found the allegation to be true and appellate court reversed that finding for insufficient evidence]; *People v. Jenkins* (2006) 140 Cal.App.4th 805, 816 [finding on strike and § 667, subd. (a)(1), allegations based on out-of-state conviction reversed for insufficient evidence; “these allegations may be retried if the prosecutor obtains additional evidence regarding the Utah robberies to establish that appellant used force or fear against a

person with a possessory interest in the property taken”]; see *People v. Cortez* (1999) 73 Cal.App.4th 276, 284.) Accordingly, we remand to permit the People, if they are able to do so, to present admissible evidence at a new trial establishing the Oklahoma kidnapping conviction is a serious or violent felony within the meaning of the three strikes law and section 667, subdivision (a)(1).

DISPOSITION

The true finding as to the allegation that Smith’s 1977 Oklahoma kidnapping conviction is a serious or violent felony within the meaning of the three strikes law and section 667, subdivision (a)(1), is reversed. Smith’s sentence is vacated in its entirety. In all other respects the judgment is affirmed. The matter is remanded for further proceedings not inconsistent with this opinion.

PERLUSS, P. J.

We concur:

ZELON, J.

BENSINGER, J.*

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