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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.

OMAR GONZALEZ,

Defendant and Appellant.

B283703

(Los Angeles County
Super. Ct. No. VA143143)

APPEAL from a judgment of the Superior Court of Los Angeles County, Roger T. Ito, Judge. Affirmed in part; reversed in part and remanded.

Melissa L. Camacho-Cheung, 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, Steven D. Matthews, Deputy Attorney General, and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Omar Gonzalez appeals from the judgment entered following a jury trial that resulted in his conviction of two counts of assault with a deadly weapon and misdemeanor vandalism. The jury found true allegations that Gonzalez personally inflicted great bodily harm. The trial court found true Gonzalez suffered a prior juvenile adjudication for robbery that qualified as a “strike” within the meaning of the “Three Strikes” law. The trial court sentenced Gonzalez as a second strike offender to a total term of nine years in state prison.

On appeal, Gonzalez contends the trial court erred by declining to instruct the jury on the defense of accident. He also argues there was insufficient evidence to support the finding that the juvenile court had sustained the robbery charge against him. Alternatively, Gonzalez contends the trial court violated his right to a jury trial and due process by imposing an enhanced sentence based upon his prior juvenile adjudication.

We conclude the documents in the record do not support the trial court’s finding that the juvenile petition had been sustained against Gonzalez for robbery. We reverse the sentence enhancement imposed based on the prior juvenile adjudication and remand for further proceedings. The judgment is otherwise affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

The victims in this case are Gustavo Gonzalez¹ and Dora Fuentes, the mother and father of Gonzalez.

¹ We will refer to the victim Gustavo Gonzalez by his first name in order to avoid any confusion because he shares the same last name as the defendant.

1. The People's Evidence²

*a. The Incident*³

On July 10, 2016, at approximately 3:00 p.m., Gustavo was in the living room of his residence in Los Angeles when Gonzalez asked him for the key to his truck. The truck was parked outside the residence on the street. When Gustavo refused to give the key to Gonzalez, he became angry. In order to avoid an argument, Gustavo went outside the house with the key in his pocket. Gonzalez followed him, continuing to insist for the key.

Once outside, Gustavo again refused to give the key to Gonzalez. Gonzalez then threw an unopened “blade” towards Gustavo, which landed across the street. Gustavo headed towards his truck and ran around it in order to prevent Gonzalez from obtaining the key. When Gonzalez could not catch Gustavo, he punched the passenger side window of the truck and broke it. Gustavo then punched Gonzalez in order to calm him down.

While outside, Fuentes arrived at the residence and saw Gustavo and Gonzalez arguing over the key to the truck. Fuentes then headed towards an apartment complex east of the residence when she felt blood on the side of her face. Gustavo was then informed by the neighbors that Fuentes was bleeding, and he took her to hospital. Gonzalez went back inside the residence.

² At trial, the testimony of Gustavo and Fuentes concerning the incident differed from the testimony of the Los Angeles County sheriff deputies.

³ The facts pertinent to the conviction for misdemeanor vandalism are not relevant to this appeal; therefore, we need not recite them in this opinion.

Fuentes's medical records stated she received six stitches on her face. Neither Gustavo nor Fuentes saw how Fuentes was injured. Gustavo acknowledged he did not see anyone with a knife that day except Gonzalez. Fuentes believed the cut was the result of an accident.

b. The Investigation

Sometime before 4:00 p.m., Deputy Laura Perales received a dispatch call about an assault and arrived at the location. She observed Gonzalez come outside of a residence. When she approached him, she noticed he had dried blood on his forearm area. Deputy Perales handcuffed Gonzalez. Thereafter, another deputy retrieved a "folding knife" from Gonzalez's pocket.

The same date, at approximately 6:30 p.m., Deputy David Escobedo, along with his partner, received a call to investigate an assault with a deadly weapon reported by the nursing staff of the hospital. When Deputy Escobedo arrived at the hospital, he met with Fuentes and observed she had "a bandage over her left cheek behind her ear." He asked her about her injury, and she explained that Gonzalez was upset and threw a knife that struck her on the side of her face causing her to bleed. After she felt the cut on her face, Fuentes ran to a stairwell located south of her residence where she remained until Gustavo took her to the hospital.

Deputy Escobedo also spoke with Gustavo. He stated that Gonzalez was upset because he refused to give him the key to his truck. Gustavo believed Gonzalez had been drinking alcohol. Gustavo also told Deputy Escobedo that they initially started arguing about the key inside the house, but when Gonzalez began throwing stuff, Gustavo went outside in order to avoid further

conflict. Once outside, Gonzalez threw a “folding knife” at Fuentes which struck the side of her face.

On July 11, 2016, the day after the incident, Deputies Samuel Gomez and Swen Swenson called Gustavo in order to go over the contents of the police report. Gustavo confirmed the information he told Deputy Escobedo was accurate. He also provided additional information that Gonzalez threw two knives at him, and because he moved, the knives missed him.

2. The Verdict and Sentencing

The jury convicted Gonzalez of two counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1); counts 1 & 2),⁴ and misdemeanor vandalism (§ 594, subd. (a); count 3). The jury found true allegations that Gonzalez personally inflicted great bodily harm as to count 1. (§ 12022.7, subd. (a).)

Following a bifurcated court trial on Gonzalez’s prior conviction, the trial court found true Gonzalez suffered a prior strike within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) based on a prior juvenile adjudication that Gonzalez committed second degree robbery (§ 211).

The trial court sentenced Gonzalez to a total term of nine years in state prison, comprised of the midterm of three years on count 1, which was doubled as a result of the prior strike, plus three years for the great bodily harm enhancement. The court then imposed the low term of two years on count 2, and six months of county jail time on count 3, both to run concurrent to the prison sentences.

Gonzalez filed a timely notice of appeal.

⁴ All further statutory references are to the Penal Code.

DISCUSSION

1. The Trial Court Did Not Err in Declining to Instruct the Jury on the Defense of Accident

Gonzalez contends the trial court was required to instruct the jury on the defense of accident with CALCRIM No. 3404⁵ because “both Gustavo and Fuentes repeatedly denied seeing [Gonzalez] take the knife in his hand and intentionally throw it at [Fuentes] or at Gustavo.” We disagree.

a. Standard of Review

“A criminal defendant is entitled, on request, to instructions that pinpoint the theory of the defense case.” (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142.) Pinpoint instructions “relate particular facts to a legal issue in the case or ‘pinpoint’ the crux of a defendant’s case, such as mistaken identification or alibi.” (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.) “ “[Pinpoint instructions] are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte.” [Citation.]’ [Citation.] In addition, the court ‘ “need not give a pinpoint instruction if it is argumentative [citation], merely duplicates other instructions [citation], or is not supported by substantial evidence [citation].” ’ ” (*People v. Lujano* (2017) 15 Cal.App.5th 187, 191.) “Evidence, to be ‘substantial’ must be ‘of ponderable legal

⁵ CALCRIM No. 3404 states in pertinent part: “[The defendant is not guilty of _____ <insert crime[s]> if (he/she) acted [or failed to act] without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of _____ <insert crime[s]> unless you are convinced beyond a reasonable doubt that (he/she) acted with the required intent.]”

significance . . . reasonable in nature, credible, and of solid value.’ ” (*People v. Johnson* (1980) 26 Cal.3d 557, 576.)

“On appeal, we review independently the question whether the trial court failed to instruct on defenses and lesser included offenses.” (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.)

b. Background

After the prosecution rested, the parties briefly discussed jury instructions, and defense counsel requested the trial court to instruct the jury with a pinpoint instruction on the defense of accident under CALCRIM No. 3404. The court refused, stating, “We don’t have any specific testimony as to exactly how that knife gets thrown at [Fuentes], aside from [Gustavo’s] impeached statement that [Gonzalez] had a knife exposed and that he threw it in the direction of [Fuentes] which does not sound like an accident to me.”

In response, defense counsel asked permission to recall both Gustavo and Fuentes to the stand, arguing that “rehabilitat[ing] them with prior consistent statements” would “make a stronger case for the accident instruction.” The trial court declined to allow further testimony, but ruled defense counsel could argue the incident was an accident to the jury based on Fuentes’s testimony that she believed her cut was the result of an accident.

c. Analysis

“Section 245, subdivision (a)(1), punishes assaults committed by the following means: ‘with a deadly weapon or instrument other than a firearm,’ or by ‘any means of force likely to produce great bodily injury.’ One may commit an assault without making actual physical contact with the person of the victim; because the statute focuses on *use* of a deadly weapon or

instrument or, alternatively, on force *likely* to produce great bodily injury, whether the victim in fact suffers any harm is immaterial.” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028, *italics added*.) The accident defense is a claim that the defendant acted without forming the mental state necessary to make his actions a crime. (*People v. Lara* (1996) 44 Cal.App.4th 102, 110.)

Here, Gonzalez relies on Fuentes’s testimony that her cut was the result of an accident in support of the pinpoint instruction on the defense of accident; however, Fuentes also testified that she never actually saw Gonzalez throw a knife in her direction. Because she did not witness the incident and we have no information about *how* Gonzalez threw the knife, we cannot reasonably inferable from her statement, without more, whether the throwing of the knife was accidental. Fuentes’s statement therefore was nothing more than pure speculation, and “[s]peculation is not substantial evidence.” (*People v. Wallace* (2017) 15 Cal.App.5th 82, 93.)

There is also no basis for the trial court to instruct the jury on the defense of accident based on the knife thrown towards Gustavo. Gustavo testified that Gonzalez had been arguing with him and was angry at him when he threw the “blade.” Thus, the evidence showed Gonzalez intended to throw the knife.

Accordingly, the trial court did not err in declining to instruct the jury on the defense of accident.

Even if the trial court’s failure to instruct the jury on the defense of accident was error, the error was not prejudicial. Under the *Watson* test, an error warrants reversal only if, “‘after an examination of the entire cause, including the evidence’” it appears “reasonably probable that a result more favorable to the

[defendant] would have been reached in the absence of the error.” (*People v. Watson* (1956) 46 Cal.2d 818, 336.)

Gonzalez contends that without the accident instruction, “the jury was not specifically directed to consider one of [his] primary theories: that he could not be guilty if he accidentally threw a knife.” We disagree.

The trial court properly instructed the jury with CALCRIM No. 875, which defined the crime of assault with a deadly weapon. The instruction made clear that an element of the offense required the jury to find Gonzalez committed the act “willfully,” which meant he did it “willingly or on purpose.” Nothing in the record indicates the jury was confused about the definition of “willfully.”

Additionally, in closing argument, defense counsel directed the jury to consider whether “this was an unintentional act where [Gonzalez] actually threw something at [Fuentes.]” He argued it was possible that “maybe something else got flung” at Fuentes, or if a knife was thrown, it was “small” and therefore, it was unforeseeable someone would be injured “as a consequence of throwing it or letting it go.”

In light of the instructions given and the arguments of defense counsel, the jury was well aware that if it had a reasonable doubt Gonzalez acted with the necessary intent, it should acquit. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852 [“Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court’s instructions.”].) Thus, the jury not only considered, but resolved adversely, the issue of whether Gonzalez acted with the necessary intent. Because the jury convicted Gonzalez, it found Gonzalez’s actions were intentional and not accidental.

Accordingly, we conclude it is not reasonably probable that if the trial court had also given the requested accident instruction under CALCRIM No. 3404, he would have obtained a more favorable outcome. Gonzalez's convictions must be affirmed.

2. We Reverse the Portion of Gonzalez's Sentence Based on the Prior Juvenile Adjudication and Remand for Further Proceedings

Gonzalez contends the record of his prior juvenile adjudication did not support the trial court's determination that the petition against him for robbery had been sustained. We agree.

Under section 667, subdivision (d)(3), a prior juvenile adjudication qualifies as a prior strike if: "(A) The juvenile was 16 years of age or older at the time he or she committed the prior offense. [¶] (B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a serious and/or violent felony. [¶] (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law. [¶] (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code."

"The People must prove each element of an alleged sentence enhancement beyond reasonable doubt." (*People v. Delgado* (2008) 43 Cal.4th 1059, 1065.) "[The] trier of fact is entitled to draw reasonable inferences from certified records offered to prove a defendant suffered a prior conviction" (*Id.* at p. 1066.) On review, we examine the record "in the light most favorable to the judgment [citation] to determine whether

substantial evidence supports the fact finder's conclusion, i.e., whether a reasonable trier of fact could have found that the prosecution had sustained its burden of proving the defendant guilty beyond a reasonable doubt [citation]." (*People v. Tenner* (1993) 6 Cal.4th 559, 567.)

Here, to prove Gonzalez suffered a prior juvenile adjudication, the People submitted four certified documents into evidence: (1) a petition alleging Gonzalez committed second degree robbery in case JJ1529 with unidentified hand-written notations stating "Admit 8-30-07" and "Max Time 5 years;" (2) a rap sheet for Gonzalez indicating the disposition of the robbery charge as "PETITIONED AND DETAINED;" (3) a booking and arrest report related to the robbery charge; and (4) a booking photograph of Gonzalez related to the robbery charge. In light of the fact there was no document evidencing the disposition of the juvenile petition, the People argue we can reasonably infer from snippets of each document that Gonzalez admitted to the robbery charge on August 30, 2007. The People's argument misses the point.

The fact that Gonzalez may have admitted to the underlying robbery charge at some point does not satisfy the requirement of section 667, subdivision (d)(3). (See *People v. Jones* (1995) 37 Cal.App.4th 1312, 1317 [completed and signed waiver form by defendant was insufficient to support jury's finding that prior conviction allegations were true].) Rather, it was the People's burden to prove that Gonzalez was "*adjudged* a ward of the juvenile court" because he committed a robbery. (§ 667, subd. (d)(3)(D), italics added.) Not only is proof of the disposition of the prior juvenile charge a requirement of section 667, subdivision (d)(3), but such information is determinative as

to whether a prior adjudication qualifies as a strike. (*In re Jensen* (2001) 92 Cal.App.4th 262, 266 [an adjudication under section 667, subdivision (d)(3)(D) requires “true finding was made on such an offense”]; see *People v. Haro* (2013) 221 Cal.App.4th 718, 724 [defendant’s prior juvenile adjudication for robbery did not qualify as a strike when juvenile court had dismissed the petition following defendant’s completion of probation].) Because the record is devoid of this critical information, we conclude the trial court erred in imposing a sentence enhancement under the Three Strikes law based on a prior juvenile petition for robbery.⁶

We therefore reverse the portion of Gonzalez’s sentence based on the prior juvenile adjudication and remand to the trial court for a limited retrial on the prior conviction allegation and for resentencing. (*People v. Monge* (1997) 16 Cal.4th 826, 845 [state and federal double jeopardy protections do not apply to the retrial of prior conviction allegations].)

DISPOSITION

The sentence enhancement imposed under the Three Strikes law based on the prior juvenile adjudication is reversed. In all other respects, the judgment is affirmed.

ROGAN, J.*

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.

⁶ In light of our ruling, we need not address Gonzalez’s constitutional challenge to his sentence.

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