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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. STEVEN BERYL HARRELL, Defendant and Appellant.	2d Crim. No. B249031 (Super. Ct. No. BA400374-01) (Los Angeles County)

Steven Beryl Harrell appeals a judgment following his conviction of assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4))[1] (count 3) and assault as a lesser-included offense of assault with a firearm, a misdemeanor (§§ 240, 241) (count 1). Harrell falls within the purview of the three strikes law with a prior serious felony conviction for robbery (§ 211), and he admitted he had served six prior prison terms (§ 667.5, subd (b)). The trial court sentenced him to an aggregate term of 12 years in state prison. It selected the midterm of three years for count 3, it doubled it pursuant to the three strikes law and added six years for the six prior prison terms. (§§ 667, 667.5, subd (b), 1170.12, subds. (a)-(d).) We conclude, among other things, that: 1) the trial court did not abuse its discretion by not striking a prior 1982 robbery conviction, and 2) the conviction of assault as a lesser-included offense in

[1] All statutory references are to the Penal Code.

count 1 must be stricken. We strike the conviction in count 1. In all other respects, we affirm.

FACTS

Harrell and Susan Goetzinger had a "boyfriend girlfriend" relationship that ended when Harrell assaulted her. Harrell "disappeared" and Goetzinger did not see him for six months.

On the evening of June 29, 2012, Goetzinger was walking to her residence with Raymond Calhoun--a friend. As she approached a street light, she looked up and saw Harrell. Harrell grabbed her breasts, picked her up, and said, "Come here, nigger." Referring to Calhoun, he asked Goetzinger, "Is that the nigger you're doing something with?" Goetzinger said, "No."

After that response, Harrell let her go. He then "knocked [her] to the ground" and hit her in the head "at least four times." He hit her in the eyes, the nose, the "temple area" and "the jaw line on both sides." Goetzinger testified, "I believe he broke my nose." She said that when he hit her, "[i]t felt like he had something hard in his hands."

Harrell turned "toward" Calhoun who ran across the street. Calhoun testified he thought he saw Harrell with "a small handgun" in "his left hand." He said to Harrell, "[W]hat are you going to do, shoot me?" Harrell "hesitated," and then "straddled" Goetzinger and "started whacking her some more."

In the defense case, Dr. Martin Chenevert testified Goetzinger's injuries were caused by "a fist or a hand," and not "by a pistol whipping." On cross-examination, the prosecutor asked, "[I]f someone were holding a pistol in their hand and hit someone with a fist, not making contact with the metal part of a gun, could that be these type of injuries?" Chenevert: "Yes."

Sentencing

During the sentencing hearing, Harrell's trial counsel requested the trial court to strike a 1982 robbery strike conviction. He said Harrell "sincerely regrets what happened" and "his last violent felony was in [19]82."

The trial court denied the request. It reviewed his long history of criminal convictions. It said, among other things, "[H]e has the robbery, he has a gun possession case, he has 2 misdemeanor aggravated assaults in the domestic violence case, in addition to drug sales, drug possessions and burglary and theft charges, that kind of stuff, go with people who have lived the life that he has lived. . . . The fact that he was on parole is aggravating."

DISCUSSION

Sentencing Discretion

Harrell contends the trial court "abused its discretion in failing to strike a thirty-year-old robbery conviction." (Capitalization omitted.) We disagree.

A trial court has discretion "on its own motion to strike prior serious felony conviction allegations in cases brought under the Three Strikes law." (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530.) In making this determination, the court considers "the nature and circumstances" of the defendant's present offenses, his or her prior record, and "the particulars of [the defendant's] background, character, and prospects" to decide if he or she "may be deemed outside the scheme's spirit . . . ." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Harrell contends his 1982 robbery conviction was remote in time and the trial court erred by not striking it during sentencing. But "remoteness alone cannot take a defendant outside the spirit" of the three strikes law. (*People v. Strong* (2001) 87 Cal.App.4th 328, 342.)

Here the trial court properly considered Harrell's entire criminal history. It found Harrell fell within the spirit of the three strikes law. Harrell's trial counsel conceded that "Harrell has been in custody, for a long part of his life." That is supported

by the record. The probation report reflects that Harrell is "a 50-year-old repeat offender, with a known history of criminal activity . . . dating back to the age of 28, a time when he clearly should have known right from wrong." His criminal history includes "extensive [arrests and convictions for] illicit narcotic activity, as well as overly assaultive and aggressive behavior, deadly weapon control law violations, and crimes against people and property." The probation department stated that he "reportedly aligned himself with gang values and gang ties" and he "poses a legitimate threat to the safety of others."

The 1982 robbery conviction was not an isolated event in his criminal record. The trial court could reasonably infer he was a recidivist. His current offense involved violence and his record includes six prior prison terms for convictions in 1982, 1991, 1993, 1998, 2001, and 2005. The court noted that Harrell was on parole at the time he committed the current assault. It said, "[W]hat that tells me is that being supervised doesn't really help a lot." The probation report reflects that there are no circumstances in mitigation.

Harrell contends that "he did not have any other violent or serious felony in his record since the 1982 robbery conviction." He suggests that his record primarily involves nonviolent drug-related offenses. But the trial court could reasonably find that after his 1982 robbery conviction Harrell committed other offenses involving violence. These include a 1988 conviction for assault with a deadly weapon and a 1989 conviction for corporal injury to a spouse/cohabitant. His current offense involved violence. It bears noting that he also had a 1981 conviction for battery.

The People claim the trial court could also reasonably find he was a "career criminal" because "[o]ver the last 32 years, appellant has been convicted of 19 offenses, sometimes multiple times for the same offense." This claim has merit. Aside from the nature of the offenses, the court may also consider evidence of a long pattern of criminal conduct in deciding not to strike a prior conviction. "Extraordinary must the circumstance be by which a career criminal can be deemed to fall outside the spirit of the

very statutory scheme within which he squarely falls and whose continued criminal career the law was meant to attack." (*People v. Strong*, *supra*, 87 Cal.App.4th at p. 332.)

Harrell contends the trial court relied on improper factors in deciding not to strike the prior offense. He suggests it incorrectly found his crime involved an "ambush." But the court used qualified language. It said the assault was "*kind of* an ambush." (Italics added.) Harrell surprised the victim. Goetzinger testified she was "shocked." Harrell grabbed her and assaulted her on the street. To such a victim, this attack might appear similar to an ambush. The "circumstances in aggravation" section of the probation report reflects that "[t]he manner in which the crime was carried out indicates planning . . . ." The trial court could reasonably infer that as Goetzinger was walking home with Calhoun, Harrell was waiting for her. But even if the court's description was incorrect, the result does not change. The court made this remark while discussing aggravating factors to determine the sentence on count 3. This was after it had decided not to strike the prior robbery conviction. Moreover, when the court made the ambush remark, it also said Goetzinger "suffered significant injuries." This was another factor it could reasonably consider in deciding not to strike the robbery conviction.

Harrell contends the trial court incorrectly found that he manipulated Goetzinger. The court said Harrell "feels a sense of remorse and that's been expressed, but there [has] also been a certain sense of manipulation [of Goetzinger] . . . . I think that two of those things kind of balance out against each other, and I think at the end of the day, *in terms of the underlying offense, it is a mid-term case* . . . ." (Italics added.) But this language relates to the court's decision to impose the midterm on count 3. This was after it had denied the request to strike the prior conviction. But even so, at trial, the prosecution introduced evidence showing that while in jail Harrell sent letters to Goetzinger. In one of the letters, Harrell said, "*I'm sorry baby Lou* . . . Love you, Lou, forever. *Please call up here and help me get my medication*, 300 milligrams of Wellbutrin." (Italics added.) In another, he said, "I miss you Peewee, baby Lou. . . . You look pretty. I miss you, Peewee. I miss you." Harrell has not shown why the court

could not view these letters as an attempt to manipulate her emotions. Nor has he shown why it could not consider this factor to decide whether Harrell's statements of remorse were sincere or self-serving.

We have reviewed Harrell's remaining contentions regarding the denial of the request to strike and we conclude he has not shown grounds for reversal. There was no abuse of discretion.

Count 1--Simple Assault

The People request that we "strike appellant's conviction for assault in count 1 because the conviction was based on the same act as appellant's conviction for assault by means likely to produce great bodily injury in count 3."

"[O]ne cannot be convicted of two offenses which arise from a single criminal act where one offense is necessarily included in the other." (*People v. McDaniel* (2008) 159 Cal.App.4th 736, 749.) "Simple assault is an offense necessarily included in the offense of assault with force likely to produce great bodily injury." (*People v. Rupert* (1971) 20 Cal.App.3d 961, 968.)

Harrell was convicted of simple assault as a lesser-included offense of assault with a firearm in count 1. But the criminal acts in count 1 were acts that were included within the broader assault offense in count 3. Goetzinger was the victim in the count 1 assault with a firearm offense and in the count 3 assault by means likely to produce great bodily injury offense. These offenses were part of the same incident which took place at the same time. The prosecutor told the jury that the assault with a firearm offense in count 1 occurred "when the defendant is hitting Ms. Goetzinger and he has a hard object in his hand," which Calhoun "describes as a gun." He said, "Count three is *the overall beating* that the defendant does against Ms. Goetzinger when he hits her in the face repeatedly . . . and that's the assault by means likely to produce great bodily injury." (Italics added.) The assault with a firearm offense in count 1 was therefore included within the broader assault offense in count 3. Consequently, the simple assault conviction was a lesser-included offense of the assault by means likely to produce great

bodily injury conviction in count 3. The assault conviction in count 1 must be stricken. (*People v. McDaniel*, *supra*, 159 Cal.App.4th at p. 749.)

Disposition

The simple assault conviction in count 1 is vacated. The abstract of judgment is ordered to be corrected accordingly. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Henry J. Hall, Judge

Superior Court County of Los Angeles

Mona D. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

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