

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

CLARENCE ANDRAE SIMPSON,

Defendant and Appellant.

B280472

(Los Angeles County  
Super. Ct. No. PA069961)

APPEAL from a judgment of the Superior Court of Los Angeles County. Hayden A. Zacky, Judge. Affirmed.

Tracy A. Rogers, 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 and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

---

In this second appeal, Clarence A. Simpson again challenges the trial court's finding that his prior out-of-state robbery conviction qualifies as a prior serious felony under California law. We affirm the judgment.

### **PROCEDURAL BACKGROUND**

Simpson was found guilty of assault with a deadly weapon by a jury in 2015. Simpson was also alleged to have suffered a prior conviction for robbery in the State of Washington. He waived a jury trial on the prior conviction. At a bifurcated bench trial, the People presented evidence which showed Simpson pleaded guilty in 2008 to first degree robbery pursuant to Revised Code of Washington Annotated sections 9A.56.200(1)(a)(ii) and 9A.56.190. The trial court found this robbery conviction qualified as a serious felony under California law. As a result of the court's finding, Simpson's four-year sentence for assault with a deadly weapon was doubled under Penal Code sections 667, subdivisions (b)-(i) and 1170.12, subdivisions (a)-(d).<sup>1</sup> In addition, five years was added to the sentence pursuant to section 667, subdivision (a)(1).

Simpson appealed and challenged the trial court's true finding as to the prior conviction. He argued Washington's robbery statute was broader than California's and thus, the People failed to prove his robbery conviction qualified as a prior strike or serious felony in California. We agreed and remanded the matter for a limited retrial on the issue. (*People v. Simpson* (Sept. 21, 2016, B266362) [nonpub. opn.] )

---

<sup>1</sup> All further section references are to the Penal Code unless otherwise specified.

During the course of our analysis, we noted a potential basis for the out-of-state conviction to qualify as a serious felony under California law. In a footnote, we observed that first degree robbery in Washington entails the display of a firearm or what appears to be a firearm. (Rev. Code Wash., § 9A.56.200.) We then noted the display of a firearm may meet the requirements of subdivision (c)(23) of section 1192.7, which identifies a serious felony as one involving the “use” of a firearm by the defendant. (*People v. Simpson, supra*, B266362 at p. 8, fn. 3.) We cautioned, however, that the evidence was “wanting” and advised the trial court to undertake a careful analysis of this basis for finding the conduct enhancement true. (*Ibid.*)

On remand, the People entered into evidence a document entitled, “Statement of Defendant on Plea of Guilty” (plea statement), which Simpson signed as part of his plea agreement in the robbery conviction. In it, he admitted, “In King County, on or about 10/30/06, I unlawfully and with intent to commit theft, took personal property of another i.e. a safe and money from [victim] against his (or their) will with threatened use of immediate force, violence, and threat of injury. In the commission of that crime I displayed a handgun.”

The trial court found the plea statement sufficient to qualify the prior conviction as a serious felony under section 1192.7, subdivisions (c)(8) and (c)(23). It reasoned, “in order to invoke force, violence and threat of injury on someone, when someone is displaying a handgun, clearly they are displaying the handgun at the victim. It is not like they are just lifting up a waistband, I think that would be an illogical assumption to make based on this.” As a result, the court again found true the allegation that Simpson had suffered a prior serious felony and

prior strike and ordered the sentence to remain unchanged. Simpson appealed a second time.

## **DISCUSSION**

Simpson challenges the trial court's true finding as to the prior conviction on two grounds. First, he contends the Sixth and Fourteenth Amendments of the Constitution prohibit the trial court from making a factual finding about the conduct underlying the prior conviction. Second, he faults the trial court for equating the “display” of a firearm, which is an element of first degree robbery in Washington and to which Simpson admitted in his plea statement, with the “use” of a firearm, which is required for a serious felony in California. We conclude neither argument merits reversal.

### **I. The Trial Court Properly Considered the Plea Statement**

As a threshold matter, Simpson contends the trial court lacks any authority to make a factual finding about the conduct underlying his robbery conviction; this task is reserved for a jury. Specifically, Simpson asserts the trial court had no power to find he displayed a handgun in the commission of the robbery to determine the robbery qualified as a serious felony. The trial court could only compare the elements of the crime of first degree robbery, as set forth by the Washington State Legislature, with the elements for a serious felony under California law.<sup>2</sup>

---

<sup>2</sup> Under Washington law, first degree robbery includes the display of a firearm or what appears to be a firearm. (Rev. Code Wash., § 9A.56.200, subd. (1)(a)(ii).) Thus, the elements of the robbery statute in Washington do not demonstrate a serious felony under section 1192.7, subdivision (c)(8) or (c)(23), because those subdivisions require an actual firearm or weapon to be

Otherwise, any fact, other than the fact of a prior conviction, which increases the statutorily authorized penalty for a crime must be found by a jury beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), *Descamps v. United States* (2013) 570 U.S. 254, 133 S.Ct. 2276 (*Descamps*), and *Mathis v. United States* (2016) 597 U.S. \_\_\_, 136 S.Ct. 2243 (*Mathis*).)

On December 21, 2017, after briefing was completed in this matter, the California Supreme Court addressed the most recent iterations of *Apprendi*, *Descamps* and *Mathis* with regard to what a trial court's role is in making findings about a prior conviction. (*People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*).) We requested additional briefing from the parties regarding the effect *Gallardo* had on this appeal.

In *Gallardo*, the defendant pled guilty to assault under former section 245, subdivision (a), which, at the time, could be violated by committing assault either with a “deadly weapon” or “by any means of force likely to produce great bodily injury.” (*Gallardo, supra*, 4 Cal.5th at p. 136.) Defendant did not specify whether she used a deadly weapon when entering her guilty plea. The trial court relied on a preliminary hearing transcript in which the victim testified the defendant used a knife during their altercation to conclude that defendant used a deadly weapon to commit the assault. Nothing in the record showed the defendant adopted the preliminary hearing testimony as supplying the factual basis for her guilty plea. (*Ibid.*)

---

used, not something that appears to be one. Simpson asserts that is the end of the inquiry for the trial court. We disagree, as discussed in this opinion.

On review, the California Supreme Court rejected the trial court's reliance on the preliminary hearing transcript. (*Gallardo, supra*, 4 Cal.5th at p. 137.) After extensive examination of *Apprendi* – *Mathis* and *Descamps* – the high court held, “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, supra*, 4 Cal.5th at p. 136, fn. omitted.)

Thus, a trial court may not make factual findings about the conduct underlying a prior conviction, but may only identify those facts a jury necessarily found or a defendant admitted in a guilty plea. In doing so, the trial court may review documents, such as indictments and jury instructions, which establish the precise statutory basis for a prior conviction. The high court considered these documents to be reliable because they identify what facts a jury necessarily found in the prior proceeding or a defendant admitted in a guilty plea. (*Gallardo, supra*, 4 Cal.5th at p. 137.) On the other hand, a preliminary hearing transcript “can reveal no such thing.” (*Ibid.*) In reviewing a preliminary hearing transcript, “at least in the absence of any pertinent admissions, the sentencing court can only guess at whether, by pleading

guilty to a violation of Penal Code section 245, subdivision (a)(1), defendant was also acknowledging the truth of the testimony indicating that she had committed the assault with a knife.” (*Ibid.*)

Based on this reasoning, the high court determined that the appropriate next step would be to allow the trial court to make the relevant determinations about what facts the defendant admitted in entering her plea. The court remanded the case “to permit the People to demonstrate to the trial court, based on the record of the prior plea proceedings, that defendant’s guilty plea encompassed a relevant admission about the nature of her crime.” (*Gallardo, supra*, 4 Cal.5th at p. 139.)

Here, the trial court did not stray beyond the bounds of the Sixth Amendment when it relied upon Simpson’s admission that his prior robbery conviction included the display of a handgun. Indeed, the U.S. Supreme Court has held that a later court determining the character of a prior conviction may consider a written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented. (*Shepard v. United States* (2005) 544 U.S. 13, 15.)

In any case, this fact is an undisputed admission about the nature of his crime which does not require a finding of disputed fact by a jury. *Gallardo* confirms that a trial court may consider a document which demonstrates what “the defendant admitted as the factual basis for a guilty plea.” (*Gallardo, supra*, 4 Cal.5th at p. 136, fn. omitted.) Simpson’s plea statement is such a document. As a result, the trial court was entitled to rely on it to “identify[] those facts that were established by virtue of the conviction itself.” (*Ibid.*)

## **II. The Display of a Firearm May Constitute Use of a Firearm**

Having determined that the trial court may rely on the plea statement to identify those facts which were established in the prior conviction, we now turn to whether the trial court's finding that the robbery qualified as a serious felony is supported by the evidence.

We conclude that the evidence supports a finding that the prior robbery conviction qualifies as a strike and a prior serious felony subject to sentencing enhancements under section 667, subdivisions (b)-(i), section 1170.12, subdivisions (a)-(d), and section 667, subdivision (a)(1).

In Washington, robbery is defined as the unlawful taking of personal property from the person of another or in his presence against his will by "the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial." (Rev. Code Wash., § 9A.56.190.) First degree robbery additionally requires the display of "what appears to be a firearm or other deadly weapon" in the commission of the robbery or immediate flight therefrom. (Rev. Code Wash., § 9A.56.200, subd. (1)(a)(ii).)

In California, a serious felony may be: "any felony in which the defendant personally uses a firearm" and "any felony in which the defendant personally used a dangerous or deadly weapon[.]" (§ 1192.7, subds. (c)(8) and (c)(23).) California authorities have consistently defined the word "use" in the context of weapon statutes as the intentional display of a weapon



in a menacing manner or the intentional firing or discharge of, or the intentional striking of a human being with the weapon. (*In re Tameka C.* (2000) 22 Cal.4th 190, 197; *People v. Wims* (1995) 10 Cal.4th 293, 302; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1317, 1319; *People v. Jacobs* (1987) 193 Cal.App.3d 375, 381 [firearm is “used” within meaning of section 12022.5 if victim senses its presence and there is threat of use sufficient to produce fear of harm]; § 1203.06, subdivision (b)(2) [“used a firearm” means to display a firearm in a menacing manner, to intentionally fire it, to intentionally strike or hit a human being with it, or to use it in any manner that qualifies under Section 12022.5].)

The California Supreme Court has explained: “Although the use of a firearm connotes something more than a bare potential for use, there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by means or display of a firearm in aiding the commission of one of the specified felonies. ‘Use’ means, among other things, ‘to carry out a purpose or action by means of’ to ‘make instrumental to an end or process’ and to ‘apply to advantage.’ (Webster’s New Internat. Dict. (3d ed. 1961).) The obvious legislative intent to deter the use of firearms in the commission of the specified felonies requires that ‘uses’ be broadly construed.” (*People v. Chambers* (1972) 7 Cal.3d 666, 672.)

It is clear that Simpson’s display of the handgun, coupled with the requirement under Washington law that he “use[d] or threatened use of immediate force, violence, or fear of injury” in the commission of the robbery constitutes “use” of a firearm or deadly weapon under California law because he displayed the gun in a menacing manner.

Simpson resists this conclusion and argues he has a right to a jury trial on whether such display constitutes use. A jury was not required in this case. *Gallardo* explained, “Our precedent instructs 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. [Citation.] We have explained that the purpose of the latter limitation is to avoid forcing the parties to relitigate long-ago events, threatening defendants with ‘harm akin to double jeopardy and denial of speedy trial.’ [Citation.]” (*Gallardo, supra*, 4 Cal.5th at p. 138.)

Simpson admitted he displayed a handgun during the commission of the robbery. This fact was properly identified by the trial court as being relevant to establish Simpson displayed a firearm, and not what appeared to be a firearm or other deadly weapon under Revised Code of Washington section 9A.56.200(1)(a)(ii). Moreover, the Washington robbery statute itself requires “the use or threatened use of immediate force, violence, or fear of injury.” (Rev. Code Wash., § 9A.56.190.) The threat of immediate force, violence, or fear of injury was manifested by the display of the gun. Contrary to Simpson’s speculation on appeal, his admission cannot be interpreted to mean he displayed the gun by glancing at a bulge in his pocket or slapping the bulge. We interpret his words according to their plain meaning. To display is “to put or spread before the view” or “to make evident.” (Webster’s 9th New Collegiate Dict. (1987) p. 365.) This is sufficient to establish that the prior conviction qualifies as a serious felony under California law.

**DISPOSITION**

The judgment is affirmed.

BIGELOW, P.J.

We concur:

GRIMES, J.

HALL, J.\*

---

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