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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.

RENNIE ANTHONY NORELLI,

Defendant and Appellant.

B278374

(Los Angeles County
Super. Ct. No. LA082117)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard H. Kirschner, Judge. Affirmed and remanded with directions.

Adrian K. Panton, 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, Noah P. Hill and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

The People charged Rennie Anthony Norelli in 2016 with two counts of second degree robbery. The People alleged Norelli had four prior convictions for felonies that were serious felonies within the meaning of Penal Code section 667, subdivision (a)(1),¹ and serious or violent felonies within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12).

The jury convicted Norelli on both counts, and the trial court found the prior conviction allegations true. The trial court sentenced Norelli to 23 years in prison.

Norelli challenges one of the five-year enhancements under section 667, subdivision (a)(1). He argues the trial court violated his Sixth Amendment right to a jury trial on whether his 1990 conviction for assault in violation of former section 245, subdivision (a)(1), was a serious felony. Because any violation of Norelli's jury trial right was harmless, we affirm.

FACTUAL AND PROCEDURAL HISTORY

A. *Norelli's 1990 Assault Conviction*

In 1990 the People charged Norelli with one count of second degree robbery and alleged he used a deadly or dangerous weapon, a flashlight, within the meaning of section 12022, subdivision (b). The People also charged him with assault with a deadly weapon or by means of force likely to produce great bodily injury, in violation of former section 245, subdivision (a)(1). Specifically, the People alleged "the crime of Assault Great Bodily Injury and With Deadly Weapon . . . a Felony, was committed by

¹ Statutory references are to the Penal Code.

[Norelli] who did willfully and unlawfully commit an assault upon [victim] with a deadly weapon, to wit, flashlight, and by means of force likely to produce great bodily injury.”

During a pretrial hearing in the 1990 case, Norelli said he would plead guilty to count two, the assault charge. The court stated: “Count two is assault. It’s alleged in count two you violated [former section] 245(a)(1), which is a felony, assault with great bodily injury and with a deadly weapon. In this case, the weapon is alleged to be a flashlight.” The court asked Norelli if he wanted to enter a plea to that charge, and Norelli responded, “Yeah. That’s fine.” The prosecutor asked Norelli whether he understood he was charged with committing assault with a deadly weapon, a flashlight, and Norelli said “yes.” The prosecutor also informed Norelli that, if he were convicted of a felony in the future, the court would impose a five-year sentence enhancement. Norelli ultimately pleaded guilty to a “violation of section 245 (a)(1) of the penal code, assault with a deadly weapon.” The abstract of judgment stated Norelli was convicted of “Assault GBI.”

B. *Norelli’s 2016 Robbery Conviction*

In 2016 the People charged Norelli with two counts of second degree robbery. The People alleged Norelli used a deadly or dangerous weapon (a knife) in committing both offenses, within the meaning of section 12022, subdivision (b). The People also alleged Norelli had four prior convictions for felonies that were serious felonies within the meaning of section 667, subdivision (a)(1), and serious or violent felonies within the meaning of the three strikes law. One of the four prior felony convictions was Norelli’s 1990 assault conviction.

The jury found Norelli guilty of both counts of robbery and found true the allegations Norelli used a deadly or dangerous weapon in committing both offenses. Norelli waived his right to a jury trial on the prior convictions, and the trial court, in a bifurcated proceeding, found the allegations true. Regarding Norelli's 1990 prior assault conviction, the trial court found Norelli committed assault with a deadly weapon, not assault by means of force likely to produce great bodily injury. Although the 1990 abstract of judgment stated "Assault GBI," the trial court found the transcript of Norelli's plea hearing "clearly reflected" that Norelli pleaded to assault with a deadly weapon, a serious felony under section 1192.7, subdivision (c)(23), and not assault by means of force likely to cause great bodily injury. The court found that the abstract contained a clerical error and that the "judge's oral pronouncement of the judgment controls" over the abstract of judgment.

The trial court granted Norelli's motion to strike the four prior serious felony convictions under section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 for purposes of punishment under the three strikes law. On the first robbery conviction, the court imposed the lower term of two years, plus a five-year term for each of the four prior serious felony convictions under section 667, subdivision (a)(1). On the second robbery conviction, the court imposed a consecutive term of one-third the middle term of three years, or one year. The court struck the punishment for the true finding that Norelli used a deadly or dangerous weapon.² Norelli timely appealed.

² The People correctly point out that the abstract of judgment in this case incorrectly states the trial court imposed four five-year enhancements under section 12022, subdivision

DISCUSSION

Norelli argues the trial court’s finding that his 1990 assault conviction under section 245, subdivision (a)(1), was for a serious felony violated his right to a jury trial under the Sixth Amendment. The People argue that Norelli forfeited this argument because he did not raise it in the trial court and that, even if Norelli preserved the issue, the trial court did not violate Norelli’s Sixth Amendment rights.

A. *The Right to a Jury Trial on Prior Conviction Allegations*

The Sixth and Fourteenth Amendments of the United States Constitution entitle a criminal defendant to “a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 477; see *People v. Merritt* (2017) 2 Cal.5th 819, 824.) “[T]he Sixth Amendment right to jury trial extends to those disputed facts that may not be formally designated as ‘elements’ of the offense, but nevertheless expose the defendant to additional punishment.” (*People v. Gallardo* (2017) 4 Cal.5th 120, 128 (*Gallardo*)). There is, however, a limited exception to this rule, known as the

(b)(1), for personal use of a deadly or dangerous weapon. In fact the court struck those enhancements. On remand the trial court must correct the abstract of judgment to reflect that the court imposed the enhancements under section 667, subdivision (a), not section 12022, subdivision (b)(1).

Almendarez-Torres exception,³ which provides that “the right to a jury trial does not apply to the fact of a prior conviction.” (*People v. Black* (2007) 41 Cal.4th 799, 818.)

The California Supreme Court addressed the scope of the *Almendarez-Torres* exception in *People v. McGee* (2006) 38 Cal.4th 682 (*McGee*). In that case the People charged the defendant with committing various crimes in connection with an armed robbery and alleged the defendant had suffered prior robbery convictions in Nevada that qualified as serious felonies under California’s three strikes law. (*Id.* at p. 688.) The definition of robbery under Nevada law, however, was broader than the definition of robbery under California law, so that “it was at least theoretically possible that defendant’s Nevada convictions involved conduct that would not constitute robbery under California law. Thus the parties agreed that inquiry into the record of the Nevada convictions was required in order to determine whether each constituted a qualifying felony for purposes of the relevant California sentencing statutes.” (*Ibid.*)

To determine whether the defendant’s conduct was a robbery under California law, the trial court in *McGee* reviewed transcripts of preliminary hearings at which the defendant made admissions and entered guilty pleas. (*McGee, supra*, 38 Cal.4th at p. 688.) The Supreme Court rejected the defendant’s argument the trial court violated his “Sixth Amendment right to a jury determination on whether his Nevada conduct amounted to a serious felony.” (*Id.* at p. 692.) The Supreme Court explained that, to determine “the nature or basis of the crime of which the defendant was convicted,” the trial court must focus on the elements of the defendant’s offense. (*Id.* at p. 691.) If the

³ *Almendarez-Torres v. United States* (1998) 523 U.S. 224.

elements do not resolve the issue, the trial court must examine the prior conviction's record to assess "whether that record reveals whether the conviction realistically may have been based on conduct that would not constitute a serious felony under California law." (*Id.* at p. 706.) The Supreme Court held that "such an inquiry does not contemplate that the court will make an independent determination regarding a disputed issue of fact relating to the defendant's prior conduct [citation], but instead that the court simply will examine the record of the prior proceeding to determine whether that record is sufficient to demonstrate that *the conviction* is of the type that subjects the defendant to increased punishment under California law." (*Ibid.*)

In *Gallardo, supra*, 4 Cal.5th 120 the California Supreme Court reconsidered *McGee* in light of recent United States Supreme Court decisions⁴ and partially overruled *McGee* "insofar as it authorizes trial courts to make findings about the conduct that 'realistically' gave rise to a defendant's prior conviction." (*Id.* at p. 128.) The People in *Gallardo* alleged the defendant, like Norelli, had a prior felony conviction for assault in violation of former section 245, subdivision (a)(1). At the time of the prior conviction, a defendant could violate section 245, subdivision (a)(1), in two ways: committing an assault with a deadly weapon or committing an assault by means likely to produce great bodily injury.⁵ The former is a serious felony (see § 1192.7,

⁴ *Descamps v. United States* (2013) 570 U.S. 254 and *Mathis v. United States* (2016) 579 U.S. ___, 136 S.Ct. 2243, both of which concerned the interpretation of a federal statute.

⁵ "Penal Code section 245, subdivision (a), has since been amended to separate the prohibitions against assault 'with a

subd. (c)(23)), but the latter is not: “If defendant committed assault with a deadly weapon, the prior conviction counted as a strike; if she committed assault by any means of force likely to produce great bodily injury, it did not.” (*Gallardo*, at p. 125.)

The trial court in *Gallardo* reviewed the transcript of the preliminary hearing in the prior assault case at which the victim testified the defendant had used a knife. The trial court found that the prior conviction was for assault with a deadly weapon (rather than assault by means of force likely to produce great bodily injury). (*Gallardo, supra*, 4 Cal.5th at p. 126.) The Supreme Court held that, because the record of the prior assault conviction did not reveal that the defendant admitted the facts in the victim’s testimony as the basis for her guilty plea, the trial court violated the defendant’s right to a jury trial. (*Id.* at pp. 136-137.) The Supreme Court stated the trial court had gone “far beyond the recognition of a prior conviction” and engaged in impermissible judicial factfinding by using the preliminary hearing transcript to determine the nature of the defendant’s prior conviction. (*Id.* at p. 134.) Disapproving one of its statements in *McGee*, the Supreme Court held that “a court considering whether to impose an increased sentence based on a

deadly weapon’ and assault ‘by any means of force likely to produce great bodily injury’ into different subdivisions.” (*Gallardo, supra*, 4 Cal.5th at p. 125, fn. 1.) “The reason for the change was to make it easier going forward to determine whether a defendant’s prior convictions for aggravated assault under section 245, subdivision (a), involved conduct subjecting the defendant to certain recidivist provisions, because enhancements such as the Three Strikes law applied to prior assault convictions only when those convictions involved the use of a deadly weapon.” (*In re C.D.* (2017) 18 Cal.App.5th 1021, 1028.)

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.” (*Id.* at p. 136.)

B. *Norelli Did Not Forfeit His Sixth Amendment Argument*

An appellate court generally will not consider an argument that could have been, but was not, presented to the trial court. (*People v. French* (2008) 43 Cal.4th 36, 46; *People v. Saunders* (1993) 5 Cal.4th 580, 591.) The failure to object is excused, however, if making the objection ““would place an unreasonable burden on defendants to anticipate unforeseen changes in the law”” (*People v. Williams* (1976) 16 Cal.3d 663, 667, fn. 4; see *People v. Rangel* (2016) 62 Cal.4th 1192, 1215; *People v. Blessett* (2018) 22 Cal.App.5th 903, 928.)

The trial court in this case sentenced Norelli in September 2016. At the time, under *McGee* “California law allowed a trial court to look to a preliminary hearing transcript to determine whether a defendant’s prior conviction was ‘realistically’ a serious felony.” (*Gallardo, supra*, 4 Cal.5th at pp. 127-128.) The Supreme Court decided *Gallardo* in December 2017. Because *Gallardo* partially overruled *McGee* after Norelli’s sentencing hearing, requiring Norelli to raise a Sixth Amendment objection in the trial court would have placed an unreasonable burden on Norelli. (See *People v. Blessett, supra*, 22 Cal.App.5th at p. 938 [change in law in *Gallardo* was not foreseeable].) Although the Supreme Court in *Gallardo* did not reach the forfeiture issue (because the People forfeited the forfeiture argument by not making it in the Court of Appeal) (*id.* at p. 938, fn. 18), the

Supreme Court did state: “It is at least questionable whether defendant should be made to bear the burden of anticipating potential changes in the law based on the reasoning of a United States Supreme Court opinion addressed to the proper interpretation of a federal statute not at issue here.” (*Gallardo, supra*, 4 Cal.5th at p. 128.) Norelli did not forfeit his Sixth Amendment argument by failing to make it in the trial court. (Cf. *People v. Penunuri* (2018) 5 Cal.5th 126, 151 [defendant did not forfeit his confrontation clause argument because *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) “made a sweeping change in the interpretation of the confrontation clause” and the defendant was “tried before *Crawford*”]; *People v. Rangel, supra*, 62 Cal.4th at pp. 1215-1217 [defendant forfeited his confrontation clause argument “based on the United States Supreme Court’s decision in *Crawford*, which was not issued until well after his trial concluded”].)

C. *Any Violation of Norelli’s Sixth Amendment Right to a Jury Trial Was Harmless*

As noted, a defendant could violate former section 245, subdivision (a)(1), by using a deadly weapon or using means of force likely to produce great bodily injury. To the extent the court may have erred under *Gallardo* by resolving a factual issue about whether Norelli’s 1990 conviction was for assault with a deadly weapon or by means likely to inflict great bodily injury, any error was harmless beyond a reasonable doubt.

“*Apprendi* error is subject to harmless error review under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. [Citation.] Thus, ‘if a reviewing court concludes, beyond a reasonable doubt, that the jury, applying the

beyond-a-reasonable-doubt standard, unquestionably would have found true' the finding in question, 'the Sixth Amendment error properly may be found harmless.'" (*People v. Selivanov* (2016) 5 Cal.App.5th 726, 763; see *Washington v. Recuenco* (2006) 548 U.S. 212, 221-222; *United States v. Cotton* (2002) 535 U.S. 625, 627, 631-632; *People v. French*, *supra*, 43 Cal.4th at pp. 52-53.) The People have the burden of proving the error was harmless under *Chapman*. (*In re I.F.* (2018) 20 Cal.App.5th 735, 781; *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165.)

Any reasonable jury reviewing the evidence of Norelli's 1990 conviction unquestionably would have found that it was for assault with a deadly weapon. At the hearing where Norelli changed his plea, the prosecutor stated to Norelli: "It's . . . alleged in count two of the complaint that you, on the 21st of December of 1989, committed an assault with a deadly weapon, a flashlight, upon [the] person of Bernie Rodriguez." The prosecutor subsequently asked, "Mr. Norelli, to complaint SA002189, charging you with count two, violation of section 245(a)(1) of the Penal Code, assault with a deadly weapon, how do you plead, guilty or not guilty," to which Norelli answered, "Guilty." And the prosecutor advised Norelli his conviction "could add five years to any future Proposition Eight case," which confirms Norelli was pleading to a felony that was a serious felony under section 667, subdivision (a). (See *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1560 ["[t]he five-year enhancement under section 667(a) for a prior serious felony conviction was added as part of "a statutory and constitutional scheme enacted by the voters in 1982 as part of Proposition 8""].)⁶ The abstract

⁶ Therefore, contrary to the argument in Norelli's initial opening brief, there was substantial evidence to support the trial

of judgment, as Norelli correctly points out, did state Norelli was convicted on his plea of “Assault GBI,” which is shorthand for assault by means likely to produce great bodily injury. (Cf. *People v. Delgado* (2008) 43 Cal.4th 1059, 1063 [where the abstract of judgment “specified the statute violated as ‘[Penal Code section] 245(A)(1)’ and described the crime as ‘Asslt w DWpn’”].) But the transcript of the hearing showed Norelli pleaded to assault with a deadly weapon, and to the extent the abstract of judgment suggested otherwise, the transcript controls over the abstract. (See *People v. Jones* (2012) 54 Cal.4th 1, 89 “[a]n abstract of judgment is not the judgment of conviction” and “does not control if different from the trial court’s oral judgment”].)

DISPOSITION

The judgment is affirmed. The matter is remanded with directions for the trial court to correct the abstract of judgment to reflect that the court imposed the five-year enhancements under section 667, subdivision (a), not section 12022, subdivision (b)(1), and to forward the corrected abstract to the Department of Corrections and Rehabilitation.

court’s finding that Norelli’s 1990 conviction was for a serious felony.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.