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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY GARCIA,

Defendant and Appellant.

B252978

(Los Angeles County
Super. Ct. No. VA129803)

APPEAL from a judgment of the Superior Court of Los Angeles County. Raul A. Sahagun. Affirmed in part and reversed in part; sentence vacated and remanded.

Christine M. Aros, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Larry Garcia guilty of first degree burglary (Pen. Code, § 459),¹ and found true the special allegation that a person other than an accomplice was present in the residence during commission of the burglary. In a bifurcated proceeding, the trial court found prior conviction allegations pleaded in an amended information to be true. The court sentenced Garcia to 13 years in prison.

Garcia does not challenge the jury's verdict. He challenges the trial court's finding his prior conviction for assault by means likely to produce great bodily injury (Welf. & Inst. Code, § 1768.8, subd. (b)) qualifies as a serious felony within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(1) & 1170.12, subds. (a)-(d)) and the prior serious felony enhancement (§ 667, subd. (a)(1)). The record of Garcia's prior conviction demonstrates Garcia pleaded guilty to assault by means likely to produce great bodily injury but did not admit the special allegation that he personally inflicted great bodily. The allegation was stricken. Garcia argues the trial court impermissibly resolved a factual dispute in making its prior serious felony finding when it reviewed the preliminary hearing transcript and determined Garcia personally inflicted great bodily injury on a non-accomplice during commission of the assault. For the reasons explained below, we agree with Garcia's argument. Accordingly, we reverse the trial court's true findings on the prior conviction allegations under the Three Strikes law and the prior serious felony enhancement, vacate Garcia's sentence, and remand the matter for further proceedings and resentencing.

BACKGROUND

Jury Trial on Current Offense

Because Garcia does not challenge the jury's guilty verdict on the burglary charge, a lengthy discussion of the evidence presented at the jury trial is unnecessary.

The prosecution presented evidence demonstrating Garcia was in the victims' backyard when the adult male victim returned home with his two minor children at about 11:00 a.m. on April 20, 2013. From inside his home, the adult male victim saw Garcia

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

grab the handle of the garage door and attempt to open it. After trying to open the garage door unsuccessfully for a few more seconds, Garcia approached the patio doors. He pulled open the locked screen door, apparently breaking the latch, and attempted to open the locked sliding glass door. The adult male victim came outside to confront Garcia and struck Garcia with a T-ball bat. Garcia climbed on top of a six-foot-tall brick wall and, after being struck with the bat again, exited the victims' backyard. The adult male victim dialed 911 and reported the crime. Garcia was thereafter arrested.

The jury found Garcia guilty of first degree burglary and found true the special allegation that a person other than an accomplice was present in the residence during commission of the burglary.

Court Trial on Prior Conviction Allegations

Garcia waived jury trial on the prior conviction allegations in the amended information and the trial court held a court trial on the allegations. The special allegations at issue here are that Garcia committed a prior serious felony—assault by means likely to produce great bodily injury (Welf. & Inst. Code, § 1768.8, subd. (b))—within the meaning of both the Three Strikes law (§§ 667, subds. (b)-(1) & 1170.12, subds. (a)-(d)) and the prior serious felony enhancement (§ 667, subd. (a)(1)). In order for Garcia's prior to qualify as a serious felony, there had to be a finding Garcia personally inflicted great bodily injury on the victim. (§ 1192.7, subd. (c)(1) [“‘serious felony’” includes “any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice”].)

The court trial on the prior conviction allegations commenced on September 23, 2013. The prosecution introduced exhibits regarding Garcia's August 2007 felony conviction for “assault by any person confined in an institution under the jurisdiction of the Department of the Youth Authority upon the person of any individual who is not confined therein . . . by any means of force likely to produce great bodily injury.” (Welf. & Inst. Code, § 1768.8, subd. (b).) These exhibits included the reporter's transcript of the June 27, 2007 preliminary hearing (People's Exh. No. 11), the reporter's transcript of Garcia's August 20, 2007 guilty plea (People's Exh. No. 12), and a certified prison

packet (§ 969b) containing the abstract of judgment, and Garcia's fingerprint card and photograph (People's Exh. No. 13).²

Below is a summary of the record of Garcia's 2007 conviction based on these exhibits the prosecution introduced at the court trial on the prior conviction allegations.

Record of 2007 conviction

At the June 27, 2007 preliminary hearing on Garcia's prior, victim Patrick Brass testified. On May 7, 2007, Brass was supervising the movement of 21 wards at the Heman G. Stark Youth Correctional Facility where he worked as a youth correctional counselor. After about seven of the 21 wards walked past Brass, one of the wards, Alejandro G., turned around quickly, faced Brass, and punched Brass in the face with closed fists seven or eight times. Brass tried to retreat by stepping backward, but several other wards, including Monolito G., Jesus P., and defendant Garcia, rushed toward him and began punching him in the face and chest with closed fists. One or possibly two other wards whom Brass was unable to identify also struck him during this group beating. Out of the wards Brass could identify, defendant Garcia was the last to join the group that assaulted Brass.

During the melee, Brass was knocked to the ground. Monolito, Alejandro, Jesus, and defendant Garcia began kicking Brass. According to Brass, Monolito was kicking him in the face, Jesus was kicking him in the head, defendant Garcia was kicking him in the head and back, and Alejandro was kicking him in the face and head. Brass was unsure whether it was Monolito or Alejandro who delivered the kick which broke his nose. Brass attempted to roll away, crawl and stand up, but the wards continued to kick him and knock him back down to the ground. After the beating had lasted about 40

² On appeal Garcia does not dispute the trial court could review the preliminary hearing transcript as part of the record of the 2007 conviction in determining whether that conviction qualified as a serious felony. (See *People v. Gonzales* (2005) 131 Cal.App.4th 767, 775 [trial court did not err in admitting the preliminary hearing transcript as part of the record of the prior conviction in deciding whether the prior conviction qualified as a strike].)

seconds, “[t]he blows slowed down” and Brass was able to stand up. Alejandro rushed toward Brass and punched Brass in the face. Brass fell to the ground again.

The paramedics arrived and took Brass to the hospital where he remained for four days. Brass suffered a broken nose, deviated septum, bruised ribs, bruised shoulder, and a concussion. He also had a footprint on his back.

After the presentation of evidence at the preliminary hearing, Garcia joined in the arguments of his codefendants that the trial court should dismiss the great bodily injury enhancement because the evidence did not demonstrate great bodily injury or that any defendant personally inflicted great bodily injury. The trial court ordered Garcia and the other defendants who participated in the group beating be held to answer the charges, including the great bodily injury enhancement.

At the August 20, 2007 hearing on Garcia’s change of plea, the prosecution moved to strike the special allegation that Garcia personally inflicted great bodily injury on Brass. Thereafter, Garcia waived his rights and pleaded guilty to a violation of Welfare and Institutions Code section 1768.8, subdivision (b), “assault upon a non-confined person by a ward, force likely to produce great bodily injury.” The parties stipulated to a factual basis for the plea under *People v. West* (1970) 3 Cal.3d 595, allowing Garcia “to plead guilty in order to take advantage of a plea bargain while still asserting his . . . innocence.” (*People v. Rauon* (2011) 201 Cal.App.4th 421, 424.) The trial court sentenced Garcia to two years in prison.

Hearings and trial court’s true findings on prior conviction allegations

Turning back to the court trial on the prior conviction allegations in the present case, and specifically the September 23, 2013 hearing, Garcia asserted the record of the 2007 conviction does not demonstrate he personally inflicted great bodily injury on Brass. Garcia pointed out he did not admit the special allegation that he personally inflicted great bodily injury, and the trial court struck the allegation before he pleaded guilty to assault by means likely to produce great bodily injury under Welfare and Institutions Code section 1768.8, subdivision (b). Garcia argued it would be unconstitutional for the trial court to make a factual finding that he personally inflicted

great bodily injury on Brass, based on a review of the preliminary hearing transcript, under the principles enumerated in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and its progeny. (*Id.* at p. 490 [“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt”].) Garcia cited *People v. Wilson* (2013) 219 Cal.App.4th 500, 503-504, 515, a case in which the appellate court held the trial court violated federal law under *Apprendi* as well as state law in deeming a prior offense to be a strike based on the preliminary hearing transcript and the trial court’s resolution of the factual dispute whether the defendant personally inflicted great bodily injury during the commission of gross vehicular manslaughter while intoxicated, a prior offense to which the defendant pleaded no contest. Because the opinion in *People v. Wilson* was not final, having been issued less than three weeks before the September 23, 2013 hearing, the trial court continued the court trial on Garcia’s prior conviction allegations.

The court trial resumed on November 20, 2013. Garcia informed the trial court the decision in *People v. Wilson, supra*, 219 Cal.App.4th 500 was final. The prosecutor cited *People v. Modiri* (2006) 39 Cal.4th 481 (*Modiri*), a case in which the California Supreme Court held CALJIC No. 17.20 correctly stated the law on personal infliction of great bodily injury, allowing a jury to make a personal-infliction finding in the context of a group beating where the “defendant personally applied force to the victim, and such force was sufficient to produce grievous bodily harm either alone or in concert with others.” (*Id.* at p. 497.) The prosecutor argued the reporter’s transcript of the June 27, 2007 preliminary hearing demonstrates Garcia personally inflicted great bodily injury on Brass under the principles enumerated in *Modiri*. Garcia countered that *Modiri* is inapplicable because “it is a non-sentencing, non-*Apprendi*” case. At the prosecutor’s request, the trial court continued the matter to the following day for further review and analysis of these legal issues.

On November 21, 2013, the prosecution filed a memorandum of points and authorities, arguing *Apprendi* is inapplicable because there was no factual dispute for the

trial court to resolve. The prosecution asserted the trial court could “determine from the preliminary hearing transcript that [Garcia] personally inflicted great bodily injury without having to resolve a factual dispute.”

After further oral argument by the parties on November 21, 2013, the trial court ruled liability for personally inflicting great bodily injury attached to Garcia as a matter of law under the principles set forth in *Modiri*. As explained above, in order for Garcia’s prior to qualify as a serious felony, there had to be a finding Garcia personally inflicted great bodily injury on the victim. (§ 1192.7, subd. (c)(1) [“‘serious felony’” includes “any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice”].) Therefore, despite the dismissal of the personal-infliction enhancement allegation, and the lack of an admission to facts supporting that enhancement allegation, the court found true the special allegations that Garcia committed a prior serious felony within the meaning of the Three Strikes law and the prior serious felony enhancement.

Sentencing

In this case, the trial court sentenced Garcia to 13 years in prison: the middle term of four years for the burglary, doubled to eight years under the Three Strikes law, plus five years for the prior serious felony enhancement.³ The court struck the allegations that Garcia had served two prior prison terms with the meaning of section 667.5, subdivision (b).

DISCUSSION

Garcia contends the trial court violated state and federal law when it resolved a factual dispute—whether he personally inflicted great bodily injury—in finding his 2007 conviction qualified as a serious felony.

³ As the Attorney General points out, the December 4, 2013 abstract of judgment incorrectly omits the five-year term the trial court imposed for the prior serious felony enhancement under section 667, subdivision (a)(1). We need not order correction of this clerical mistake because we are reversing the trial court’s true findings on the prior serious felony allegations.

“[I]n deciding whether a particular prior conviction qualifies as a serious felony for California sentencing purposes,” a trial court may examine “the record of the prior criminal proceeding to determine the nature or basis of the crime of which the defendant was convicted.” (*People v. McGee* (2006) 38 Cal.4th 682, 691.) On appeal Garcia does not dispute the court may review a preliminary hearing transcript as part of the record of a prior conviction in determining whether the conviction qualifies as a serious felony. (See *People v. Gonzales, supra*, 131 Cal.App.4th at p. 775 [trial court did not err in admitting the preliminary hearing transcript as part of the record of the prior conviction in deciding whether the prior conviction qualified as a strike].)

The court’s examination of the record of a prior conviction “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. This is an inquiry that is quite different from the resolution of issues submitted to a jury, and is one more typically and appropriately undertaken by a court.” (*People v. McGee, supra*, 38 Cal.4th at p. 706.) Under both state and federal law, “A court may not impose a sentence above the statutory maximum based on disputed facts about prior conduct not admitted by the defendant or implied by the elements of the offense.” (*People v. Wilson, supra*, 219 Cal.App.4th at p. 516 [trial court erred in finding the defendant’s prior conviction for gross vehicular manslaughter while intoxicated was a strike where the trial court reviewed the preliminary hearing transcript and decided the defendant personally inflicted the injury which caused the victim’s death even though the defendant testified his girlfriend grabbed the steering wheel and caused the accident].)

Personal infliction of great bodily injury is not an element of the offense to which Garcia pleaded guilty in 2007—“assault by any person confined in an institution under the jurisdiction of the Department of the Youth Authority upon the person of any individual who is not confined therein . . . by any means of force likely to produce great

bodily injury.” (Welf. & Inst. Code, § 1768.8, subd. (b).) Garcia has always disputed he personally inflicted great bodily injury on Brass. He never admitted the personal-infliction special allegation, and the trial court struck the allegation before he pleaded guilty to the offense. Thus, in order for the trial court to make true findings on the prior serious felony special allegations, the court first had to make its own finding Garcia personally inflicted great bodily injury on Brass based on the court’s review of the reporters’ transcript of the June 27, 2007 preliminary hearing.

The Attorney General argues the trial court’s personal-infliction finding was permissible under state and federal law because the court was not required to resolve a disputed fact in finding Garcia personally inflicted great bodily injury on Brass because this was a group beating situation. In support of this argument the Attorney General cites *Modiri, supra*, 39 Cal.4th 481, a case in which the California Supreme Court explained a jury may make a personal-infliction finding in the context of a group beating where the jury finds the “defendant personally applied force to the victim, and such force was sufficient to produce grievous bodily harm either alone or in concert with others.” (*Id.* at p. 497.) The fact a jury *may* make such a finding does not mean such a finding is *required* as a matter of law in every group beating case.

In making its finding Garcia personally inflicted great bodily injury on Brass, the trial court necessarily decided the force Garcia applied to Brass was sufficient by itself or combined with the force applied by other wards to produce great bodily injury. Reviewing the preliminary hearing transcript, as the trial court did, we are not convinced a jury would have made this personal-infliction finding. Brass testified the beating lasted about 45 seconds. Out of the four wards Brass could identify, Garcia was last to join the melee. Before Garcia started punching Brass in the face and chest, Alejandro already had punched Brass in the face with closed fists seven or eight times, and Monolito and Jesus already had begun punching Brass in the face and chest with closed fists. At some point Brass fell to the ground, and the wards began kicking him. It was clear from Brass’s testimony that Garcia did not kick Brass in the face and did not deliver a kick which caused Brass’s broken nose or deviated septum. Garcia kicked Brass in the head and

back. The beating concluded after Brass rose to his feet and Alejandro delivered a blow to the face which knocked Brass to the ground, ending the incident. Based on this record, we cannot find as a matter of law Garcia applied force to Brass which was sufficient by itself or combined with the force applied by other wards to produce great bodily injury. There are disputed factual issues which need to be resolved. For example, do the injuries Garcia could have caused or contributed to—bruised ribs, bruised shoulder, concussion, footprint on back—even constitute great bodily injury? Did Garcia apply force sufficient to produce any of those injuries either by himself or in combination with other wards?

The trial court erred in finding Garcia’s 2007 conviction qualified as a serious felony for purposes of the Three Strikes law and the prior serious felony enhancement. The court did that which is prohibited by state and federal law: “impose a sentence above the statutory maximum based on disputed facts about prior conduct not admitted by the defendant or implied by the elements of the offense.” (*People v. Wilson, supra*, 219 Cal.App.4th at p. 516.) The court resolved factual disputes in reviewing the transcript of the preliminary hearing and deciding Garcia personally inflicted great bodily injury on Brass. Garcia did not admit he personally inflicted great bodily injury on Brass and the elements of the offense to which he pleaded guilty do not include personal infliction of great bodily injury.

Because the trial court’s error is not structural, we reverse only if we conclude the error is prejudicial under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18. (*People v. Wilson, supra*, 219 Cal.App.4th at pp. 518-519.) “If we conclude, beyond a reasonable doubt, that a jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true the strike prior allegation [and the prior serious felony enhancement allegation], then the error is harmless.” (*Id.* at p. 519.) As discussed above, based on our review of the preliminary hearing transcript, we believe a jury could reasonably find Garcia did not personally inflict great bodily injury on Brass. The court’s error is not harmless.

There is additional prejudice resulting from the procedural history of the prior conviction. In 2007, the prosecution moved to dismiss the personal-infliction

enhancement and Garcia pleaded guilty to the Welfare and Institutions Code section 1768.8, subdivision (b) charge, without admitting the enhancement. Following his conviction on the burglary count in the instant case, he waived jury on the question of the existence of his prior convictions on the assumption the personal infliction of great bodily injury enhancement was no longer at issue. Had he known the prosecution would resurrect the previously dismissed enhancement upon sentencing, arguably he would not have waived jury on the question of the existence of the prior offense. This too constitutes prejudice because he had a constitutional right to a jury trial on the personal-infliction finding.

Accordingly, we reverse the court's true findings on the prior conviction special allegations under the Three Strikes law and the prior serious felony enhancement, and vacate Garcia's sentence. We remand the matter for further proceedings, including retrial of the prior conviction allegations (see *Monge v. California* 524 U.S. 721, 724 [Double Jeopardy Clause does not preclude retrial on prior conviction allegations in noncapital sentencing proceedings], and resentencing.

DISPOSITION

The trial court's findings that Garcia's 2007 conviction qualifies as a serious felony under the Three Strikes law and the prior serious felony enhancement (§ 667, subd. (a)(1)) are reversed and the sentence vacated. The matter is remanded for further proceedings consistent with this opinion and for resentencing. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J.

BENDIX, J.*

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