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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. STEVEN TRUJILLO ROMERO, Defendant and Appellant.	B272230 (Los Angeles County Super. Ct. No. PA085248)

APPEAL from a judgment of the Superior Court of Los Angeles County. Hayden A. Zacky, Judge. Affirmed in part, reversed in part, and remanded with directions.

Benjamin Owens, 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, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and Thomas C. Hsieh, Deputy Attorney General, for Plaintiff and Respondent.

Steven Romero appeals the judgment entered following a jury trial in which he was convicted of one count of criminal threats in violation of Penal Code[1] section 422, subdivision (a). The jury found the accompanying gang allegation true.[2] (§ 186.22, subd. (b)(1)(B), (C).) Following a court trial on the allegations that appellant had suffered a prior serious or violent felony strike conviction (§§ 667, subds. (b)–(i), 1170.12, subd. (b)) and had served four prior prison terms (§ 667.5, subd. (b)), the trial court found the strike prior and one of the prior prison term allegations to be true. The trial court imposed an aggregate sentence of nine years in state prison.

We reverse the trial court's determination that appellant's 2003 juvenile adjudication for violation of former section 245, subdivision (a)(1) qualifies as a serious felony conviction and hence a strike based on the court's reliance on a handwritten reference to a baseball bat contained in the juvenile petition. Given that none of the documents in the record of the adjudication distinguished between assault with a deadly weapon and assault by means likely to produce great bodily injury, the trial court's determination that the prior juvenile adjudication constituted a serious felony is unsupported by substantial evidence. Accordingly, we remand the matter for resentencing. In all other respects, we affirm.

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

[2] The jury acquitted appellant of the charge of assault with a firearm, and found a personal firearm use allegation to be not true.

FACTUAL BACKGROUND

The night of December 2, 2015, Christopher Arroyo was working as a security guard with a partner in an apartment complex. Approximately 10:00 p.m., Arroyo's partner confronted appellant and another man in the complex's underground parking garage. Appellant and the other man left. Around 11:30 p.m., Arroyo saw appellant outside a gate at the back of the complex. As he jiggled the knob on the gate, appellant said to Arroyo, " 'Hey, homeboy. Can you open the gate for me?' " Arroyo asked appellant what unit he lived in. Appellant responded, " 'Open the fucking gate before I blast you.' " Appellant then pulled a revolver from his waistband and pointed it at Arroyo's face.

Arroyo froze. Appellant told him he'd better watch his back, and made a hand sign toward Arroyo, with his ring and little fingers touching his thumb, his index finger pointing out, and his middle finger at a diagonal. Arroyo saw that appellant had a Playboy bunny tattoo on his head. As soon as appellant left, Arroyo called his company and then called 911.

Police arrived about an hour later and found Arroyo waiting outside the apartment complex. Arroyo related what had happened, but did not give complete answers or make eye contact with the officers. He appeared distraught and shaky, and he seemed to have been crying.

Arroyo testified at the preliminary hearing. He identified appellant as one of the two men in the parking garage, and as the person who had returned and threatened him. Although Arroyo could not remember appellant saying a gang name when he made the hand sign, he thought he recalled telling the police that appellant had said "Playboys."

DISCUSSION

I. The Trial Court's Pretrial Comments About Appellant's Tattoos

Appellant contends the trial court's comments at a pretrial hearing about the tattoos on appellant's head discouraged him from testifying, and thereby violated his federal constitutional right to testify and his Sixth Amendment right to counsel. We disagree.

A. *Background*

During a pretrial status conference, the trial court advised appellant that it had discussed the possibility of settling the case with the prosecutor and appellant's attorney. The court outlined appellant's maximum exposure and the People's offer, and suggested appellant might want to plead guilty. The court explained that if appellant decided to go to trial, the court would be fair, but "if you get up there and testify, let's be honest, you've got the tattoos all over your head. Not real helpful." This prompted the following exchange:

"THE DEFENDANT: Discrimination.

"THE COURT: I don't care if it's discrimination.

"THE DEFENDANT: My tattoos have nothing to do with anything.

"THE COURT: Do you want to hear me out or not? I am not saying me. I'm saying a jury. You're going to have twelve people from the community sitting in that jury box, okay? And they're going to look at you testifying and I am going to be honest with you, they're going to be probably somewhat alarmed because of who you represent in their minds. You may be the nicest guy in the world, but your outside appearance is saying something different."

The court advised appellant that if he did testify, any prior convictions involving moral turpitude could be used to impeach him. The court added that it was appellant's decision whether to accept a plea bargain or go to trial. Appellant responded he would not take a plea bargain, to which the court replied, "Then we'll have a jury trial."

At the close of the prosecution's case, the trial court advised appellant of his rights regarding testifying: "You have an absolute right to remain silent. You also have a Fifth Amendment right against self-incrimination. If you elect to remain silent, I will instruct the jury that they are not to consider your silence for any purpose whatsoever during deliberations. [¶] On the other hand, you have a right to testify on your own behalf, if you wish. Meaning you will waive and give up your right to remain silent and potentially your Fifth Amendment right against self-incrimination. [¶] Do you understand you have each of those rights as I have explained them to you?"

Appellant responded, "Yes." He then conferred with his attorney, and, joined by counsel, waived his right to testify.

B. *Appellant forfeited his claim by failing to object or otherwise raise the issue below; in any event, appellant has failed to demonstrate error*

Appellant did not object to the trial court's remark about his tattoos or otherwise raise the issue below, and thereby forfeited the claim on appeal. Nevertheless, appellant urges us to consider the issue because his claim involves a criminal defendant's right to testify and the right to counsel—both "fundamental constitutional rights." As the United States Supreme Court has recognized, however, " '[n]o procedural principle is more familiar to this Court than that a constitutional

right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' " (*United States v. Olano* (1993) 507 U.S. 725, 731; *People v. Trujillo* (2015) 60 Cal.4th 850, 856.) Thus, "a defendant who fails to make a timely objection to the claimed misconduct forfeits the claim unless it appears an objection or admonition could not have cured any resulting prejudice or that objecting would have been futile." (*People v. Abel* (2012) 53 Cal.4th 891, 914.)

Appellant does not contend that an objection to the court's remark would have been futile. Instead, he argues that because trial counsel might have agreed that appellant should not testify for the same reason articulated by the court, appellant has no recourse in a claim of ineffective assistance of counsel. He goes on to assert that the court has an obligation to ensure a fair trial, "the most fundamental of all freedoms." (*Estes v. Texas* (1965) 381 U.S. 532, 540.) That duty, appellant observes, includes "ensuring [a] properly instructed and impartial jury." We do not disagree with these general propositions. But regardless of the merits of appellant's arguments, they provide no basis for overlooking appellant's failure to preserve the issue for appeal by failing to raise it first in the trial court.

Appellant has also failed to show any connection between his decision not to testify at trial and the trial court's remarks during pretrial settlement discussions. After the court candidly advised appellant that a jury might not view him favorably because of the tattoos on his head, appellant opted to proceed to trial. It was then not until after the prosecution had presented its case and the trial court advised appellant of his constitutional

rights to testify and to remain silent that appellant conferred with counsel and decided not to testify.

" 'Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error.' " (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549.) Appellant's failure to point to anything in the record that so much as hints at a relationship between his decision not to testify and the court's pretrial remark about his tattoos is fatal to his claim that the trial court interfered with his right to testify or intruded upon the attorney-client relationship.

II. Admission of Arroyo's Preliminary Hearing Testimony

The district attorney's office could not locate Arroyo for trial, and, finding Arroyo to be unavailable, the trial court admitted his preliminary hearing testimony in lieu of his live testimony at trial. Appellant contends the trial court erroneously found Arroyo to be unavailable under Evidence Code section 240, subdivision (a)(5) because the prosecution failed to demonstrate due diligence in its efforts to locate the witness and procure his attendance at trial. According to appellant, the admission of Arroyo's preliminary hearing testimony at trial thus violated appellant's confrontation rights under California law and the Sixth Amendment. We disagree.

A. *Background*

Paula Fong, an investigator in the Los Angeles County District Attorney's Office, received a subpoena for Arroyo around 4:00 p.m. on April 4, 2016, two days before the start of trial. That day, she searched computer databases and found two addresses for him, one of which was his mother's residence. The next

morning, Fong went to both addresses; at the first, she did not see Arroyo's vehicle, and at the second, she met Arroyo's mother, who told her Arroyo had moved out of state and she did not know where he was.

Fong left her business card with Arroyo's mother. When Fong returned to her car, she received a call on her cell phone from the number Fong had for Arroyo. Arroyo told Fong he was in New York and wanted nothing to do with the case. Although he told Fong that he goes back and forth between New York and California and he would be returning to California for work, he refused to give Fong any address where he might be located.

Fong asked him to send her a picture of himself next to a sign showing his location and the current date to prove he was in New York. Arroyo sent a picture of a sign in a parking lot that said, "Hudson, New York," but he was not in the picture. He then sent pictures of himself and his wife on a train, but none of the pictures gave any indication he was in New York. Fong asked him to take a "selfie" when he got off the train showing a New York sign so they " 'could be done with this.' " Arroyo responded, " 'U are done with this. Going to change my number. Am no longer in California. Just want this to stop.' " Fong replied, " 'OK. Take care of yourself and your family.' " Arroyo texted back, " 'I will. And am sorry again. Just can't do it, seeing his face. And just can't not. Am sorry.' " In another text, Arroyo said, " 'Don't want to be mean. I just don't want my family in danger as well. So can u guys stop bugging all my family. I don't want them to see where they live.' " Fong repeated her request for a "selfie" with a sign. Several hours later, Arroyo texted, " 'I plead the Fifth Amendment.' "

In the course of her investigation, Fong learned that Arroyo had changed his license plate in January, and had renewed his California driver's license in March, using the same addresses she had visited. In addition, Los Angeles Police Detective John Sawada told Fong he had spoken with Arroyo on March 31, and Arroyo had said he was no longer in California but in New York. The prosecutor also spoke with Arroyo, who told him he was either in New York or going to New York. The prosecutor had offered to pay Arroyo's travel expenses to attend trial, but Arroyo said he did not care about the money; he was afraid and did not want to come to court.

Fong testified that although the district attorney's office has the resources and ability to "ping" a cell phone to determine its location, Fong did not attempt to do so in this case. She also made no effort to pull Arroyo's cell phone records or otherwise search for his location using his cell phone. Fong did not seek to locate Arroyo in New York by contacting that state's law enforcement or the motor vehicle department.

No effort was made to contact Arroyo through his California employer. Although Fong had Arroyo's business address, she did not attempt to reach Arroyo there because the prosecutor had advised her that Arroyo no longer worked there. However, defense counsel had spoken with the human resources director of Arroyo's California employer and was informed that Arroyo's employment records indicated he had originally given notice for March 31, but he had extended his employment to the end of April.

B. *The trial court properly concluded Arroyo was "unavailable"*

"A criminal defendant has the right, guaranteed by the confrontation clauses of both the federal and state Constitutions, to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const., art. 1, § 15.)" (*People v. Herrera* (2010) 49 Cal.4th 613, 620 (*Herrera*).)

A defendant's confrontation right is not absolute, however, and is subject to "the long-standing exception that '[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.' (*Crawford v. Washington* (2004) 541 U.S. 36, 59; see *People v. Cromer* (2001) 24 Cal.4th 889, 892.)" (*People v. Wilson* (2005) 36 Cal.4th 309, 340.) The exception is codified under California law in Evidence Code section 1291. (*People v. Alcala* (1992) 4 Cal.4th 742, 784–785; *Herrera*, *supra*, 49 Cal.4th at p. 621.) "Section 1291, subdivision (a)(2), provides that 'former testimony,' such as preliminary hearing testimony, is not made inadmissible by the hearsay rule if 'the declarant is unavailable as a witness,' and '[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.' Thus, when the requirements of section 1291 are met, the admission of former testimony in evidence does not violate a defendant's constitutional right of confrontation." (*Herrera*, *supra*, 49 Cal.4th at p. 621, fn. omitted.)

On the question of a witness's unavailability, "[t]he constitutional right to confront witnesses mandates that, before a

witness can be found unavailable, the prosecution must 'have made a good-faith effort to obtain his presence at trial.' " (*People v. Smith* (2003) 30 Cal.4th 581, 609 (*Smith*), quoting *Barber v. Page* (1968) 390 U.S. 719, 725; *Herrera*, *supra*, 49 Cal.4th at p. 622.) The United States Supreme Court has explained that " 'if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation. "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." [Citation.] The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness.' (*Ohio v. Roberts* (1980) 448 U.S. 56, 74, disapproved on another point in *Crawford v. Washington* (2004) 541 U.S. 36, 60–68.)" (*Herrera*, *supra*, 49 Cal.4th at p. 622.)

The good faith requirement is codified under California law in Evidence Code section 240, which provides that a hearsay declarant may be found " 'unavailable as a witness' " when he or she is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).) Courts often describe the reasonable diligence requirement as one of " 'due diligence.' " (*People v. Cromer*, *supra*, 24 Cal.4th at p. 898.)

Where the facts concerning the prosecution's efforts to locate a witness are undisputed, the appellate court reviews the trial court's determination independently, not deferentially, considering " 'the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were competently explored.' " (*Herrera*, *supra*, 49

Cal.4th at p. 622; *People v. Fuiava* (2012) 53 Cal.4th 622, 675.) The independent standard of review applies equally to the "failed efforts to *locate*" a witness as to the "failed efforts to *obtain the attendance* of a witness at trial." (*People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1432; see also *Ohio v. Roberts*, *supra*, 448 U.S. at pp. 74–75 [requiring good faith effort to "locate and present" the witness].)

"[D]iligence has been found when the prosecution's efforts are timely, reasonably extensive and carried out over a reasonable period." (*People v. Bunyard* (2009) 45 Cal.4th 836, 856, citing *People v. Cummings* (1993) 4 Cal.4th 1233, 1297 [prosecution contacted witness's neighbors, employer, and relatives, and made frequent stops at witness's last known residence over a one-week period]; *People v. Diaz* (2002) 95 Cal.App.4th 695, 706–707 (*Diaz*) [numerous attempts to find witness defeated by witness's determined effort to avoid testifying]; *People v. Wise* (1994) 25 Cal.App.4th 339, 344 [checking several addresses where witness might be found, as well as local jail, hospital, and coroner].) In contrast, diligence has been found lacking where the prosecution's efforts were "perfunctory or obviously negligent." (*People v. Bunyard*, *supra*, 45 Cal.4th at p. 855.)

Courts have also taken into account a witness's own efforts to avoid testifying in determining whether the prosecution made a good faith effort and exercised due diligence in seeking to procure the witness's live testimony. (See, e.g., *Smith*, *supra*, 30 Cal.4th at pp. 623–624; *People v. Cogswell* (2010) 48 Cal.4th 467, 478–479; *Diaz*, *supra*, 95 Cal.App.4th at pp. 705–707; *People v. Francis* (1988) 200 Cal.App.3d 579, 588.) In *Smith*, for example, one of the defendant's sexual assault victims refused to testify at

the penalty phase of the trial unless she could express her views on the punishment the defendant should receive. (*Smith*, *supra*, 30 Cal.4th at p. 621.) Our Supreme Court held that the circumstance that the victim was physically present in the courtroom and merely refused to testify did not preclude a finding of unavailability. (*Id*. at p. 624.) Noting that Evidence Code section 240 does not " 'state the exclusive or exact circumstances under which a witness may be deemed legally unavailable for purposes of Evidence Code section 1291,' " *Smith* found the trial court's efforts to induce the victim to testify to be "reasonable under the unusual circumstances" of the case and rejected the argument that the trial court should have threatened to fine the victim if she continued to refuse to testify. (*Ibid*.) Trial courts, the high court declared, " 'do not have to take extreme actions before making a finding of unavailability.' " (*Ibid*.)

Similarly in *Diaz*, the court found the prosecution's efforts to procure the witness met the standard for establishing unavailability. In addition to a thorough search for the witness and more than five attempts to personally serve her with the subpoena, the evidence showed that the witness knew the police were looking for her and she was determined not to testify. Upholding the admission of the witness's preliminary hearing testimony, the Court of Appeal concluded "not only that the prosecution demonstrated due diligence in trying to secure [the witness's] presence at trial, but also that it is fairly clear [the witness] purposely made herself unavailable because she was unwilling to testify." (*Diaz*, *supra*, 95 Cal.App.4th at p. 706.)

Here, in ruling that Arroyo was unavailable, the trial court found the investigator's efforts to locate the witness were undertaken in good faith and demonstrated due diligence under

the circumstances. As for the prosecution's delay in initiating the search until two days before trial, the court suggested a reasonable explanation for waiting might have been to gain the element of surprise in an attempt to serve Arroyo with a subpoena. The trial court also noted that the prosecution had established that Arroyo was doing everything he could to avoid being found: "He has escaped or left the jurisdiction of California. He is somewhere between here and New York. We don't know where. And he has clearly and expressly stated his desire not to come to court because he is scared."

While in hindsight "it is always possible to think of additional steps that the prosecution might have taken to secure the witness' presence, [citation] . . . the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising." (*Hardy v. Cross* (2011) 565 U.S. 65, 68–70, 71–72; *People v. Valencia* (2008) 43 Cal.4th 268, 293; *People v. Andrade* (2015) 238 Cal.App.4th 1274, 1293 [" ' "[t]he law requires only reasonable efforts, not prescient perfection" ' "].)

Given the prosecution's reasonable efforts to find him, and Arroyo's determination not to be found and to avoid testifying at trial, the trial court properly found Arroyo to be unavailable, and thus properly admitted Arroyo's preliminary hearing testimony in this case.

III. Admission of Arroyo's Preliminary Hearing Testimony About His Statement to Police

Appellant next asserts the trial court committed prejudicial error in admitting the portion of the transcript in which Arroyo admitted he might have told police that appellant said "Playboys" when he flashed the hand sign. Even if we were convinced the

trial court erred in admitting the testimony, we find no prejudice and therefore reject appellant's contention.

A. *Background*

On direct examination at the preliminary hearing, Arroyo testified that he could not recall whether appellant said a gang name when he flashed the hand sign at Arroyo. The prosecutor then asked, "Did you tell the police that when the defendant made the hand sign, that he also said 'Playboys'?" Arroyo responded that he could not recall, and the prosecutor asked, "Do you recall that you said that to them though?" Arroyo replied, "I think so."

Defense counsel objected on the ground that "[a]n honest lack of memory is not a basis for impeachment." The court overruled the objection, observing that the prosecutor was not trying to impeach the witness, but seeking to refresh his recollection. On cross-examination Arroyo repeated that he had no recollection of appellant saying anything that Arroyo identified as the name of a gang.

At trial, appellant renewed the objection, arguing that the testimony was not admissible as a prior inconsistent statement, and the prosecutor had improperly attempted to refresh the witness's recollection with a leading question. The court ruled that evidence of Arroyo telling police that appellant had said "Playboys" was inadmissible as a prior inconsistent statement, but could come in as recollection refreshed. The court added that any inconsistency between Arroyo's direct and cross-examination testimony about whether appellant said anything when he flashed the hand sign went to the weight rather than admissibility of the evidence.

B. *Appellant has failed to demonstrate prejudice*

"We review claims regarding a trial court's ruling on the admissibility of evidence for abuse of discretion. [Citations.] Specifically, we will not disturb the trial court's ruling 'except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266; *People v. Alvarez* (1996) 14 Cal.4th 155, 203, 207.) Applying this standard, we find no error in the trial court's admission of Arroyo's fleeting acknowledgment that he might have told police that appellant had said "Playboys."

Moreover, appellant has made no showing of prejudice. It is incumbent upon appellant to demonstrate prejudice from the erroneous admission of evidence. (Cal. Const., art. VI, § 13; *People v. Brotherton* (1874) 47 Cal. 388, 404.) And reversal is warranted only where there is a reasonable probability that appellant would have received a more favorable result had the testimony been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Appellant's prejudice claim boils down to nothing more than an assertion that the evidence of Arroyo's statement to police was relevant to the charges. Relevance, however, does not establish prejudice, and there was abundant evidence beyond this snippet of testimony that appellant had invoked his gang to threaten Arroyo, and that supported the gang allegation. Specifically, along with his clearly visible gang tattoos, the Playboys hand sign appellant made as he pointed a gun and threatened to "blast" Arroyo was as unmistakable an invocation of appellant's gang as anything Arroyo might have reported appellant said.

IV. The Trial Court's True Finding on the Strike Prior Allegation

At the court trial on appellant's prior convictions, the prosecution presented a "969(b)" packet of certified documents, including the petition and minute orders from appellant's 2003 juvenile adjudication for violation of former section 245, subdivision (a)(1). Appellant contends substantial evidence does not support the trial court's conclusion that his 2003 juvenile adjudication for violation of former section 245, subdivision (a)(1) constituted a serious felony and qualified as a prior strike conviction under the Three Strikes law. We agree.

A. *Background*

None of the documents submitted to prove the prior strike contained any facts or details regarding the juvenile court's findings regarding the prior offense, referring only to a violation of (former) section 245, subdivision (a)(1). Indeed, only the juvenile petition contained any reference at all to commission of the offense with a deadly weapon. Specifically, count 3 of the petition alleged a violation of former section 245, subdivision (a)(1) in general terms: "On or about 08/11/2002 . . . the crime of ASS[AULT] WITH DEADLY WEAPON, BY MEANS LIKELY TO PRODUCE [GREAT BODILY INJURY], in violation of P[ENAL] CODE 245 (A)(1), a Felony, was committed by said minor, who did willfully and unlawfull[y commit] assault upon [RLD] with a deadly weapon, to wit, *other*, and by means of fo[rce likely to] produce great bodily injury." (Italics added.) The word "*other*" was crossed out and "BASEBALL BAT" interlineated by hand. Following a contested hearing, the juvenile court found the petition true as to count 3, dismissed counts 1 and 2, and sustained the petition.

Appellant argued below that, because a violation of former section 245, subdivision (a)(1) could be established merely on the basis of force likely to produce great bodily injury, the People had failed to prove the prior adjudication was for an assault with a deadly weapon and hence a strike. The trial court disagreed. Relying solely on the handwritten reference to a baseball bat in the juvenile petition, the trial court found the prior was an assault with a deadly weapon and declared "the strike prior to be true beyond a reasonable doubt."

B. *Former Penal Code section 245, subdivision (a)(1)*

In 2003, when the juvenile court sustained the petition alleging a violation of section 245, subdivision (a)(1), that section provided in relevant part: "Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished . . . ." Former section 245, subdivision (a)(1) thus described alternative means of committing the same offense, aggravated assault, within the same subdivision, and a violation could be found without regard to whether the crime was committed by means of a deadly weapon or by force likely to produce great bodily injury.[3] (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1036–1037 [violation of section 245, subdivision (a)(1) required proof of two elements: "One, a

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[3] In 2012, the Legislature amended section 245 by deleting the phrase "or by any means of force likely to produce great bodily injury" from subdivision (a)(1) and placing it in newly enacted subdivision (a)(4) (Stats. 2011, ch. 183, § 1), thereby separating the two ways in which an aggravated assault could occur.

person was assaulted, and two, the assault was committed by the use of a deadly weapon or instrument or by means of force likely to produce great bodily injury"]; *People v. Martinez* (2005) 125 Cal.App.4th 1035, 1043; *In re Mosley* (1970) 1 Cal.3d 913, 919, fn. 5 [section 245 "define[d] only one offense, to wit, 'assault upon the person of another with a deadly weapon or instrument *or* by any means of force likely to produce great bodily injury' "].)

Although use of a deadly weapon and great bodily injury were interchangeable for purposes of a violation of former section 245, subdivision (a)(1), under the Three Strikes law only assault with a deadly weapon constitutes a serious felony. (§§ 1192.7, subd. (c)(31), 667, subd. (d)(1), 1170.12, subd. (b)(1); *People v. Delgado* (2008) 43 Cal.4th 1059, 1065 (*Delgado*).) Accordingly, the mere fact of a juvenile adjudication for aggravated assault under former section 245, subdivision (a)(1) would be insufficient to establish the adjudication constituted a strike in any case in which the juvenile court made no findings with regard to the precise means used to commit the offense.

C. *Substantial evidence does not support the trial court's finding that the prior adjudication involved a serious felony*

The prosecution is required to prove each element of an alleged sentence enhancement beyond a reasonable doubt. (*Delgado*, *supra*, 43 Cal.4th at p. 1065; *People v. Miles* (2008) 43 Cal.4th 1074, 1082.) Where, as here, the mere fact that a defendant was convicted under a particular statute does not establish the serious felony allegation, our Supreme Court has held that the sentencing 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; *People v. Trujillo* (2006) 40 Cal.4th 165, 179; *Delgado*, at p. 1065.)

None of the documents submitted by the People in this case indicates whether the juvenile court found an assault with a deadly weapon or merely an assault likely to produce great bodily injury when it sustained the petition following a contested hearing. "[I]f the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense. [Citations.] In such a case, if the statute under which the prior conviction occurred could be violated in a way that does not qualify for the alleged enhancement, the evidence is thus insufficient, and the People have failed in their burden." (*Delgado*, *supra*, 43 Cal.4th at p. 1066.)

We review the record in the light most favorable to the judgment to determine whether it is supported by substantial evidence. (*Delgado*, *supra*, 43 Cal.4th at p. 1067.) "In other words, we determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt." (*People v. Miles*, *supra*, 43 Cal.4th at p. 1083; *People v. Ledbetter* (2014) 222 Cal.App.4th 896, 900.)

The trial court was permitted to draw reasonable inferences from the records offered to prove appellant suffered a prior serious felony conviction. (*Delgado*, *supra*, 43 Cal.4th at p. 1066; *People v. Henley* (1999) 72 Cal.App.4th 555, 561.) But the court here went beyond reasonable inference when it weighed the allegations in the petition to make its own factual determination about the nature of the offense. In reaching its

conclusion that the allegation regarding a deadly weapon—in the form of a handwritten reference to a baseball bat—established the crime as a serious felony, the court simply disregarded the reference in the petition to assault by means of force likely to produce great bodily injury. Moreover, none of the other documents submitted by the People contained any information which might tip the scale toward a conclusion that appellant's prior offense was an assault with a deadly weapon.

Because the evidence presented by the prosecution established appellant's prior juvenile adjudication could have rested on use of a deadly weapon *or* force likely to produce great bodily injury, it was insufficient to prove appellant guilty of a prior serious felony conviction beyond a reasonable doubt. Without further evidence of the underlying circumstances, it must be presumed that appellant's conviction under former section 245, subdivision (a)(1) was for the least serious form of the offense, that is, assault by means of force likely to produce great bodily injury. (*Delgado*, *supra*, 43 Cal.4th at p. 1066.)

The trial court's finding that appellant's prior juvenile adjudication for aggravated assault constituted a serious felony lacked substantial evidentiary support. We therefore conclude the court erred in imposing the sentence enhancement under the Three Strikes law. In light of our decision on substantial evidence grounds, we need not address appellant's constitutional challenge to the sentence.

DISPOSITION

The trial court's determination that the 2003 juvenile adjudication for violation of former Penal Code section 245, subdivision (a)(1) constituted a prior serious felony conviction and a strike is reversed. The cause is remanded for resentencing. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.