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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. GABRIEL HERNANDEZ CASAS, Defendant and Appellant.	2d Crim. No. B276021 (Super. Ct. No. 2016000557) (Ventura County)

Gabriel Hernandez Casas appeals after a jury convicted him on two counts of inflicting corporal injury on a spouse or cohabitant. (Pen. Code, § 273.5, subd. (a)[1].) In a bifurcated proceeding, the jury found that appellant (1) had suffered a prior conviction for battery with serious bodily injury (§ 243, subd. (d)); (2) had admitted the crime was a serious felony (§ 1192.7, subd. (c)(8)); and (3) had served two prior prison terms (§ 667.5, subd. (b)). Based on these findings, the trial court found true an

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

allegation that appellant had a prior strike conviction. (§§ 667, subds. (c)(1), (e)(1), 1170.12, subds. (a)(1), (c)(1)). Appellant was sentenced to eight years in state prison, consisting of the midterm of three years doubled for the strike prior, plus one year for each of the two prison priors. He contends the court prejudicially erred in admitting hearsay evidence pursuant to Evidence Code section 1370. He also claims the evidence is insufficient to support the true finding on the prior strike allegation. We affirm.

FACTS AND PROCEDURAL HISTORY

Victim Y.Z. testified at the preliminary hearing but willfully absented herself from the trial. The trial court found she was unavailable as a witness and granted the prosecution's motion to admit her preliminary hearing testimony. (Evid. Code, §§ 240, 1291, subd. (a)(2).) Recordings of Y.Z.'s call to the police and her field interviews were admitted under Evidence Code section 1370.

Appellant and Y.Z. ended their relationship in November 2015 after dating for several years. At about 4:00 a.m. on January 5, 2016, appellant called Y.Z. and told her he was coming to her house. A short time later, Y.Z. saw appellant standing in front of her house near her car. She went outside and asked him to leave. They began arguing about Y.Z.'s relationship with her roommate. The argument escalated and appellant scratched Y.Z.'s face and choked her. Appellant ran away after Y.Z. kneed him and threatened to pepper spray him.

Y.Z. called the Ventura County Sheriff's Department and reported the incident. Deputy Matthew Smith responded to Y.Z.'s house and conducted a recorded interview. The deputy also took a photograph of redness on Y.Z.'s neck and three-inch

scratches on her cheek. In recounting the incident, Y.Z. said appellant called her multiple times before coming over and threatened to "fuck up" her car. He was "drunk or high on something" and grabbed her arm, choked her, and grabbed and squeezed her face. Appellant had previously broken Y.Z.'s ankle and she always carried pepper spray to protect herself from him. Y.Z. also said that appellant's family had a restraining order against him.

Later that night, appellant told Y.Z. in a voicemail message that he was coming to her house. She picked him up at a bus stop because she was "feeling bad for him." While she was driving with appellant, she received a text message from her roommate. Appellant, who had been drinking, became upset and accused Y.Z. of being romantically involved with her roommate. Y.Z. pulled into a parking lot across from the Fillmore Police station in case she needed to summon help. After she parked, appellant pulled her hair and bit her cheek. Y.Z. honked her horn and officers responded. Sheriff's deputies were also dispatched to the scene.

In a recorded in-field interview, Y.Z. said appellant bit her and pulled her hair because she was texting her roommate. Photographs were taken of the hair appellant pulled from Y.Z.'s head and the bite mark on her cheek. After being advised of his *Miranda*[2] rights, appellant claimed he had merely kissed Y.Z. on the cheek.

Appellant called Y.Z. from jail several times after his arrest. During one call, he told her to say they were just friends and that the bite on her cheek was a "hickey." A few hours after Y.Z. testified at the preliminary hearing, appellant called her and

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

urged her to tell the prosecutor she did not want to press charges. He also denied biting her and claimed he merely gave her a "little nibble." When appellant also urged Y.Z. to say he was only trying to kiss her or give her a hickey, she replied, "No, I'm not gonna change it. I'm just not gonna show up anymore. I'm gonna try my best not to even take the subpoena."

DISCUSSION

Y.Z.'s Recorded In-Field Interviews

For the first time on appeal, appellant contends that Y.Z.'s recorded in-field interviews were erroneously admitted in their entirety under Evidence Code section 1370. He specifically takes issue with Y.Z.'s statements that (1) appellant previously broke her ankle; (2) Deputy Smith was the first officer not to ask her "what are you doing" with appellant; (3) appellant threatened to vandalize her car and had previously vandalized it; (4) appellant was "high" when he attacked her; (5) appellant's family had a restraining order against him; and (6) she always carried pepper spray "[be]cause of what [appellant] does." Appellant claims these statements should have been excluded because they did not "purport[] to narrate, describe, or explain" appellant's infliction or threat of physical injury upon her, as provided in subdivision (a)(1) of Evidence Code section 1370.

We agree with the People that this claim is forfeited. "When an objection is made to proposed evidence, the specific ground of the objection must be stated. The appellate court's review of the trial court's admission of evidence is then limited to the stated ground for the objection. (Evid. Code, § 353.)" (*People v. Kennedy* (2005) 36 Cal.4th 595, 612, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.) Although appellant objected to "any evidence alluding to [Y.Z.'s]

statements," the specific grounds for the objection were that Y.Z.'s preliminary hearing testimony was not admissible under Evidence Code section 1291 because defense counsel did not have a full and fair opportunity to cross-examine her. Appellant does not raise that claim on appeal. He offers *People v. Bob* (1946) 29 Cal.2d 321, for the proposition that a general evidentiary objection can be sufficient to preserve a more specific objection for appeal, but that rule has only been applied in death penalty cases. (*People v. Coleman* (1988) 46 Cal.3d 749, 777.) Moreover, statutory law now makes clear that a specific objection is necessary. (Evid. Code, § 353, subd. (a).)

We also conclude that any error in admitting the challenged statements was harmless. Although appellant acknowledges that Y.Z.'s preliminary hearing testimony was sufficient to sustain his convictions, he claims there is a "doubt" whether the jury convicted him based on the challenged statements, which "essentially amounted to inadmissible character evidence" under Evidence Code section 1101.

We are not persuaded. As the People correctly note, the evidence of appellant's guilt was "strong" and he displayed "a striking consciousness of guilt" during his phone calls to Y.Z. Moreover, the jury heard through other admissible evidence that (1) appellant had been drinking when both incidents occurred; (2) he tended to get violent when he drank; (3) he had previously assaulted Y.Z. "a lot of times"; and (4) he threatened to vandalize her car. (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 414-415 [any assumed error in admitting hearsay statement was harmless beyond a reasonable doubt where other properly-admitted evidence "conveyed the same information"].) Because it is not reasonably probable that appellant would have

achieved a more favorable result had the challenged evidence been excluded, any error in admitting that evidence was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1093 [*Watson* standard of review applies to erroneous admission of evidence in violation of statutory rules of evidence].)

Prior Strike Allegation

Appellant contends the evidence is insufficient to support the true finding on the prior strike allegation, which is premised on his prior conviction of battery with serious bodily injury (§ 243, subd. (d)). We conclude otherwise.

Under the three strikes law, a defendant's sentence is enhanced upon proof he or she has been previously convicted of a strike, i.e., "violent felony" as defined in section 667.5, subdivision (c), or a "serious felony" as defined in section 1192.7, subdivision (c). (§§ 667, subd. (f)(1), 1170.12, subd. (d)(1).) A serious felony, as relevant here, includes "any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm." (§ 1192.7, subd. (c)(8).)

We review appellant's challenge in accordance with the usual rules on appeal applicable to claims of insufficient evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*Ibid.*)

Although battery with serious bodily injury (§ 243, subd. (d)) is not expressly defined as a serious felony under section 1192.7, the count of the complaint charging appellant with that crime alleged that the crime "is a serious felony within the meaning of Penal Code section 1192.7(c)." After an information was filed, the battery count was amended to include a more specific allegation that the crime was a serious felony under subdivision (c)(8) of section 1192.7.[3] In a felony disposition statement, appellant pled guilty to the battery count and admitted "the serious felony allegation pursuant to H & S [*sic*] 1192.7(c)(8)." The minute order of the change of plea hearing also reflects that appellant admitted the crime was a serious felony under subdivision (c)(8) of section 1192.7.

At the bifurcated trial on the prior conviction allegations, the prosecution offered this evidence along with a prosecutor's expert opinion that appellant's prior conviction was a strike because he had admitted the crime was a serious felony. The parties subsequently agreed that the court, not the jury, should determine whether the conviction qualified as a strike. The court subsequently found the allegation to be true.

Appellant asserts that the evidence is insufficient to support the court's finding because the complaint charging him with violating subdivision (d) of section 243 "did not allege factual elements necessary to render a violation of this section a serious felony." The complaint was amended, however, to expressly

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[3] The original complaint included a serious felony allegation but did not make specific reference to subdivision (c)(8) of section 1192.7. The complaint stated: "NOTICE: The above offense is a serious felony within the meaning of Penal Code section 1192.7(c)."

allege that the crime was a serious felony under subdivision (c)(8) of section 1192.7, which applies to "any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm." (§ 1192.7, subd. (c)(8).) Appellant admitted this allegation as part of his plea.

This procedure complied with the requirements of section 969f. "Under section 969f, subdivision (a), when the People believe that the defendant's offense is a serious felony, 'the facts that make the crime constitute a serious felony may be charged in the accusatory pleading' and '[i]f the defendant pleads guilty of the offense charged, the question whether or not the defendant committed a serious felony as alleged *shall be separately admitted or denied by the defendant*.' (Italics added.) The section was enacted in order to 'prequalify a crime as a serious felony' for purposes of the three strikes law. [Citation.] The section allows "'the fact that a crime is a serious felony to be proven at the time the first crime is tried so that it may become a matter of record.'" [Citations.] Where the prosecution includes a serious felony allegation and the defendant pleads guilty or no contest, section 969f, subdivision (a), *requires* the defendant to admit or deny the allegation. [Citation.]" (*People v. Bueno* (2006) 143 Cal.App.4th 1503, 1509 (*Bueno*).)

In *Bueno*, the defendant previously had been charged with battery with serious bodily injury (§ 243, subd. (d)), with the following separate allegation: "NOTICE: The above offense is a serious felony within the meaning of Penal Code section 1192.7(c)(8)." The defendant pled no contest to the battery charge, but did not admit the crime was a serious felony and no other evidence was offered to prove it was. (*Bueno*, *supra*,

143 Cal.App.4th at pp. 1507-1508.) The trial court nevertheless found true an allegation that the crime was a serious felony. (*Id.* at p. 1506.)

On appeal, the People contended "that in pleading no contest to the battery charge, Bueno admitted the offense was a serious felony because the information alleged it was a serious felony within the meaning of section 1192.7, subdivision (c)(8)." (*Bueno*, *supra*, 143 Cal.App.4th at p. 1509.) The Court of Appeal disagreed. After discussing the requirements of section 969f, the court reasoned that "[t]here is no evidence in this record of compliance with section 969f, subdivision (a); that is, there is no evidence that Bueno admitted the serious felony allegation in the information. Absent such evidence, we must treat the allegation as dismissed." (*Id.* at p. 1510.)

Appellant, unlike the defendant in *Bueno*, admitted the serious felony allegation in the charging document. By charging the allegation and obtaining appellant's admission as contemplated in section 969f, the conviction was prequalified as a serious felony and that fact became "a matter of record." (*Bueno*, *supra*, 143 Cal.App.4th at p. 1509.)

Appellant contends that the reference to subdivision (c)(8) of section 1192.7 does not satisfy section 969f's requirement that "the facts that make the crime constitute a serious felony . . . be charged in the accusatory pleading." (§ 969f, subd. (a).) We are not persuaded. The allegation at issue in *Bueno* merely referred to subdivision (c)(8) of section 1192.7, yet the Court of Appeal recognized that the defendant's admission of that allegation would have sufficed to sustain a finding that the battery offense was a serious felony and thus a strike. Moreover, appellant indicated in his felony disposition statement that his attorney

had explained the direct and indirect consequences of his plea and admission. There is nothing in the record to suggest that appellant did not understand what he was actually admitting.[4] He was *required* to either deny or admit the allegation (§ 969f, subd. (a); *Bueno*, *supra*, 143 Cal.App.4th at p. 1509), and the record plainly and unequivocally reflects he admitted the allegation. His claim of insufficient evidence fails.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

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[4] Appellant notes that his felony disposition statement erroneously identifies section 1192.7 as part of the Health and Safety Code. This clerical error is of no moment. The section is otherwise correctly cited and appellant's admission that the offense was a serious felony cites the Penal Code. It is also of no moment that the admitted allegation was apparently dismissed for purposes of sentencing.

Charles W. Campbell, Jr., Judge
Superior Court County of Ventura

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