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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. VINCENT BARRAZA, Defendant and Appellant.	B291988 (Los Angeles County Super. Ct. No. TA144705)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sean D. Coen, Judge. Affirmed and remanded.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Steven E. Mercer and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Vincent Barraza appeals the judgment following his conviction and 53-year sentence for shooting at four police officers and two bystanders. He asserts multiple challenges to his conviction and sentence. We will correct certain clerical errors in the judgment and remand for the trial court to consider striking a five-year enhancement for a prior serious felony. We otherwise affirm.

PROCEDURAL BACKGROUND

Barraza was charged with six counts of attempted murder (Pen. Code, §§ 664, 187, subd. (a));[1] four counts of assault with a firearm on a police officer (§ 245, subd. (d)(1)); two counts of assault with a semi-automatic firearm (§ 245, subd. (b)); two counts of shooting at an occupied dwelling (§ 246); and possession of a firearm by a felon (§ 29800, subd. (a)(1)). Firearm enhancements were alleged (§ 12022.53, subds. (b), (c)), as was a prior serious felony and strike conviction (§§ 667, subds. (a)(1), (d), 1170.12, subd. (b).) Following trial, a jury acquitted him of the attempted murder counts, but convicted him of the other offenses and found the enhancements true. He was sentenced to 53 years in prison and assessed various fines and fees.

FACTUAL BACKGROUND

Around 10:30 a.m. on November 15, 2017, Barraza's neighbor Bryan Smith saw him standing on the lawn fidgeting and mumbling to himself. Barraza looked in the direction of the nearby elementary school and placed a clip in a handgun. He aimed at Smith and pulled the trigger. Smith ducked and heard a shot, then ran inside and called 911.

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[1] All statutory citations refer to the Penal Code.

Another neighbor Lawrence Schreer heard sounds like "fireworks" outside and opened his front door to see what happened. He saw Barraza holding a handgun and shoot across the street.

A third neighbor Ana Medina was washing dishes when she heard a noise like a firecracker. She saw Barraza through a window. Barraza pointed a gun in Medina's direction and pulled the trigger as Medina dropped to the floor. She heard a gunshot. At some point, Barraza crossed the street away from Medina's house, pointed the gun at the nearby school, and fired. Medina heard Barraza talking and his voice "sounded awful."

Araceli Gonzalez was inside her car when she heard two gunshots. Moments later she saw Barraza running across the intersection pointing a gun "everywhere," almost reaching the sidewalk abutting the school.

At that point, Los Angeles County Sheriff's Deputies Andre Newsome and Herman Arevalo arrived at the scene and saw Barraza walk toward the school with a gun. As they parked their patrol unit in the street, Barraza pointed his gun at Deputy Newsome, who exited the car and ran for cover. Barraza fired twice as Deputy Newsome concealed himself behind a house. Barraza then fired twice at Deputy Arevalo as he exited the patrol unit and hid behind it. Bystander Gonzalez fled into the school. Deputy Newsome saw children playing outside at recess and yelled for them to go inside.

Barraza ran toward a brick wall and hid behind it, firing another round at Deputy Arevalo on the way. A police helicopter arrived carrying two deputies, and Barraza shot at it as he climbed the steps to his house and went inside.

Inside the house, Katharina Lairson, who lived with Barraza, was able to convince Barraza to give her the gun, and she exited with it. Moments later, Barraza's friend Eddie McKenna exited and was detained by police. Deputies deployed flash bangs and shot sponge rounds to shatter the windows. Barraza eventually exited at 3:17 p.m. and surrendered.

Katayoun Modarres, a teacher at the nearby elementary school, testified she was in her classroom when the school was locked down. She let Gonzalez into the classroom and the school remained on lockdown until 2:30 p.m.

Smith's car had been shot twice, and Medina's house had been hit to the right of the kitchen window where she was standing. Casings were found at the scene that matched Barraza's gun.

Lairson testified Barraza was in a good mood that morning when he and McKenna left the house for a car repair shop nearby. They returned about 40 minutes later. McKenna entered the house while Barraza was still outside. Lairson was about to go outside when McKenna said Barraza had something in his hand that looked like a gun. Lairson went outside and said, "Vince, put the gun down." Barraza was holding the gun, was mumbling, and appeared agitated. He did not acknowledge Lairson. She had never seen him like that and called 911. After she reentered the house and locked the door, she heard two gunshots.

At some point, Barraza broke the door open saying, "They're going to kill me. They're going to kill me," and "They're after me. They're going to hurt me." When the police arrived, he asked why they were there. He finally gave the gun to Lairson, who took it outside.

Barraza testified the morning of the shooting he smoked marijuana dipped in PCP as he was waiting for McKenna to finish at the car repair shop. He remembered nothing until he was inside the house with Lairson as she was telling him to give her the gun. After he heard the police over loudspeakers telling him to surrender, he did.

Barraza later told police he was shooting at the "bad guys" in an effort to defend himself. He did not shoot toward the school and ran inside when the helicopter arrived.

Barraza had a long history of PCP use dating back to ninth grade. He had gotten the gun two days earlier from family members after a cousin's death and had kept it in his trunk. He had no recollection of pointing it at anyone or shooting at the police or a helicopter. The effect of his PCP use that morning was entirely different from his previous experience, and he did not recover from the effects until the next month.

During his booking process, Barraza exhibited bizarre behavior and was sweating, fidgety, and irritated. He was transferred to another location because the jail could not accept anyone who had "mental or medical ailments."

A pharmacist expert testified PCP can cause memory loss, hallucinations, paranoia, and altered perception, and it can cause the brain to disassociate from reality. Mixed with marijuana, it can cause an enhanced psychotic effect. Urine samples taken from Barraza three weeks after the shooting tested positive for PCP.

DISCUSSION

I. The Trial Court Did Not Abuse Its Discretion in Allowing Testimony About the School Lockdown

In the trial court, Barraza objected to the "constant repetition" of the lockdown at the nearby school, as well as admission of testimony from the schoolteacher Modarres and a school principal regarding the lockdown (the school principal never testified). He argued this evidence was cumulative, irrelevant, inflammatory, and more prejudicial than probative under Evidence Code section 352. The prosecutor argued the school lockdown evidence generally corroborated other witness testimony and provided context for the shooting that occurred next to it. The prosecutor stated she would not insinuate Barraza intended to shoot any students. Specifically for Modarres, the prosecutor argued her testimony would explain the nearby school had been placed on lockdown and would corroborate Gonzalez's testimony that she had taken cover inside Modarres's classroom.

The court overruled the objections, finding the references to the school were not more prejudicial than probative because the shooting occurred near the school. Although the court noted Modarres's testimony was cumulative, her testimony corroborated Gonzalez's actions and demeanor coming into the classroom and showed the school was placed on lockdown and how long it lasted. When she was called at trial, Modarres's testimony stayed within those parameters and was short, lasting just over five transcript pages.

On appeal, Barraza argues the trial court abused its discretion and violated his constitutional rights by admitting this evidence. We review the trial court's rulings on the relevance

and admissibility of evidence for abuse of discretion. (*People v. Merriman* (2014) 60 Cal.4th 1, 74.) We find none. The references to the school lockdown provided context for the shooting, which occurred close to the school. Modarres's testimony—which was brief—further explained the lockdown and corroborated Gonzalez's eyewitness account of the incident and her reaction after running into the school. The trial court could have viewed this corroboration as important because Gonzalez saw Barraza open fire on the officers who arrived in the patrol unit. The trial court could have reasonably concluded this evidence was not particularly inflammatory and was not so unduly prejudicial that it outweighed its probative value, so its exclusion was not mandated.

II. The Trial Court Properly Gave a Flight Instruction

The trial court instructed the jury with CALJIC No. 2.52 regarding flight: "The flight of a person after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide." Barraza objected to the instruction, contending there was no evidence of flight because Barraza did not leave the "area where the crime was committed." The trial court disagreed, finding substantial evidence supported the instruction because Barraza went down the street then returned to his house.

On appeal, Barraza again contends insufficient evidence supported the flight instruction and the trial court's use of the instruction violated his constitutional rights. We review claims of instructional error de novo. (*People v. Rivera* (2019) 7 Cal.5th

306, 326.) We find no error because the evidence amply supported giving the instruction.

" 'In general, a flight instruction "is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt." [Citations.] " '[F]light requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested.' " ' " (*People v. Boyce* (2014) 59 Cal.4th 672, 690.) The evidence showed exactly that. Barraza was moving down the street toward the school when police arrived. He opened fire on the two officers in the patrol unit and ran behind a brick wall to hide. He then moved back toward his house and opened fire on the helicopter over his head before he fled inside, where he remained with police in a standoff for hours. This movement in response to the arrival of the police was more than sufficient to show he had " ' " 'a purpose to avoid being observed or arrested.' " ' " (*Boyce, supra,* at p. 690.) The flight instruction was proper.

III. The Trial Court Did Not Abuse Its Discretion in Denying Barraza's *Romero* Motion

Barraza filed a motion to strike a 1997 attempted robbery strike conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, arguing the conviction was remote, his current offense was committed while under the influence of a controlled substance, and he was trying to achieve a better life for himself. The court denied the motion because Barraza did not fall outside the spirit of the "Three Strikes" law. The court cited Barazza's history of misdemeanor drug convictions and "nonstop life of lawlessness" since the 1997 conviction and the seriousness

of the present offenses, believing it was "a miracle no one was seriously hurt or injured or killed."

Barraza challenges the denial of his motion to strike on appeal. We review the trial court's decision for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376 (*Carmony*).) We find none.

In deciding whether to strike a prior "strike" conviction, a trial court " 'must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' " (*Carmony, supra,* 33 Cal.4th at p. 377.)

The trial court reasonably concluded Barraza did not fall outside the spirit of the Three Strikes law. While his 1997 conviction was old, his probation report revealed an unbroken string of drug and other offenses stretching back to 1987 and continuing to January 2017. This demonstrated all prior attempts at rehabilitation have failed. For his current offenses, he created an extremely dangerous situation by shooting at six victims, including four police officers, and he did so near a school where children were outside. We agree with the trial court it was remarkable no one was seriously injured or killed. Even if the shooting was partially the result of his use of narcotics, we cannot say the trial court's refusal to strike his 1997 conviction was "so irrational or arbitrary that no reasonable person could agree with it." (*Carmony, supra,* 33 Cal.4th at p. 377.)

IV. The Trial Court Did Not Abuse Its Discretion in Refusing to Strike the Firearm Enhancements

The jury found true firearm enhancements pursuant to sections 12022.5, subdivision (a) and 12022.53, subdivisions (b) and (c). During sentencing, Barraza moved to strike the firearm enhancements pursuant to Senate Bill No. 620 and section 1385. He spoke to the court personally, explaining the crime did not represent who he was. He cited his age of 51, his clearance to enter government facilities, his up-to-date taxes, and his steady job for 15 years. He also noted he had not had a prior gun charge. He said he was willing to speak with teens at schools and seek professional help. His counsel added Barraza grew up in an environment of drugs, but he had not displayed violence since his 1997 attempted robbery conviction.

The prosecutor opposed striking the enhancements, citing Barraza's long criminal history and arguing he had never shown any inclination to seek help for his drug addiction. She also cited the facts of the shooting and argued he did not seem to understand the gravity of the offenses or take responsibility for his drug use.

The court denied the motion to strike, citing public safety and finding it "unbelievable to me that we're here, and that you're not hearing from family members of deputies who were killed, or from your neighbors who were killed, or that you're still here alive."

Senate Bill No. 620, effective January 1, 2018, amended sections 12022.5, subdivision (c) and 12022.53, subdivision (h) to give the trial court discretion whether to strike previously mandatory firearm enhancements. (§§ 12022.5, subd. (c) ["The court may, in the interest of justice pursuant to Section 1385 and

at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."]; 12022.53, subd. (h) [same].) We review the refusal to strike enhancements pursuant to section 1385 for abuse of discretion. (*Carmony, supra,* 33 Cal.4th at p. 371.) We again find none.

The reasons that supported the trial court's refusal to strike Barraza's prior strike conviction also support the court's refusal to strike the firearm enhancements. The current shooting was serious, demonstrating Barraza was a danger to public safety. He failed to address his decades-long drug use and failed to take full responsibility for his actions. The court acted well within its discretion in refusing to strike the firearm enhancements.

V. The Trial Court Properly Imposed the Section 667, Subdivision (a)(1) Enhancement

The information alleged Barraza's prior strike conviction qualified him for an additional five-year enhancement for a prior serious felony pursuant to section 667, subdivision (a)(1). During sentencing, the court asked the parties whether they were ready to proceed with the "trial on the priors," and defense counsel stated there would be "an admission to the 1997 issue," i.e., the 1997 attempted robbery prior conviction. Barraza admitted on the record that he suffered the 1997 conviction for attempted robbery, which was "also a strike conviction." The prosecutor took waivers of his rights, and Barraza again admitted on the record he had suffered the 1997 attempted robbery conviction, which the prosecutor stated was "a felony conviction as well as a strike conviction." The court accepted the waivers and

admission, finding the conviction was "a serious or violent felony within the meaning of Penal Code section 667(d) and Penal Code section 1170.12 subdivision (b)." The court imposed a consecutive term of five years "[p]ursuant to Penal Code section 667 subdivision (a) subdivision (1)."

Barraza contends the five-year enhancement imposed pursuant to section 667, subdivision (a)(1) for his prior serious felony conviction must be stricken because the trial court did not specifically cite that statute in taking his admission and finding his 1997 attempted robbery conviction was a strike. We disagree.

"[A] defendant's admission of an alleged enhancement is valid even if it does not include specific admissions of every factual element required to establish the enhancement." (*People v. French* (2008) 43 Cal.4th 36, 50.) The information alleged Barraza's prior attempted robbery conviction qualified as a serious felony pursuant to section 667, subdivision (a)(1). It was the same prior conviction Barraza admitted and the court expressly found constituted a strike conviction pursuant to sections 667, subdivision (d) and 1170.12. Barraza does not contend his admission was not knowing or voluntary, but only that the court's failure to cite section 667, subdivision (a)(1) requires us to strike the five-year term and remand for a new admission or a court trial on his prior conviction. Not only would that duplicate the proceedings the trial court already conducted, but it would elevate form over substance. Nothing in the record suggests Barraza was unaware he was admitting his prior conviction as a strike as well as a serious felony under section 667, subdivision (a)(1) as pled in the information, so the additional five-year term was valid.

Barraza relies on *People v. Bryant* (1992) 10 Cal.App.4th 1584, but it is distinguishable. In that case, the court found the defendant could not be subject to additional sentencing allegations following his no contest plea because the allegations required proof of facts not admitted by the defendant during his plea to the base offenses. (*Id.* at pp. 1594–1596.) Here, by contrast, Barraza admitted he suffered the 1997 attempted robbery conviction, the fact necessary to support the imposition of the five-year term under section 667, subdivision (a).

VI. Remand Is Proper for the Trial Court to Exercise Discretion Whether to Strike the Section 667, Subdivision (a)(1) Enhancement

Although the section 667, subdivision (a)(1) enhancement was validly imposed, Senate Bill No.1393 went into effect on January 1, 2019, giving trial courts discretion whether to strike a formerly mandatory section 667, subdivision (a) enhancement. (Sen. Bill No. 1393 (2017–2018 Reg. Sess.) §§ 1–2; *People v. Zamora* (2019) 35 Cal.App.5th 200, 208; *People v. Jimenez* (2019) 32 Cal.App.5th 409, 426.) The parties agree this amendment applies to Barraza's conviction, which is not yet final. (*Zamora, supra,* at p. 208; *Jimenez, supra,* at p. 426.) We agree and will remand the matter for the trial court to exercise its discretion whether to strike the section 667, subdivision (a) enhancement. We express no opinion on how the court should exercise its discretion.

VII. Barraza Forfeited His Challenge to the Fines and Fees and Any Error was Harmless

Citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157, Barraza challenges the trial court's imposition of $930 in fines and fees because he claims he has no present ability to pay

them.[2] He failed to raise this issue in the trial court, which forfeits the issue on appeal. He argues his forfeiture should be excused because the change *Dueñas* made in the law was unforeseeable, but we have rejected the same argument in the past and do so again. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155.)

Barraza contends if the issue is forfeited, his counsel was ineffective for failing to object to the fines. His contention fails because he cannot show prejudice. We agree with the cases that have held that when the record shows the defendant "had some past income-earning capacity, [and] going forward we know he will have the ability to earn prison wages over a sustained period," as is the case with Barraza's 53-year sentence, any error in the denial of a hearing on his ability to pay is harmless beyond a reasonable doubt. (*People v. Johnson* (2019) 35 Cal.App.5th 134, 139; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1076; *People v. Jones* (2019) 36 Cal.App.5th 1028, 1035.) Thus, any objection by his counsel would have been futile.

VIII. Clerical Errors Must Be Corrected

Barraza contends references to a section 667.5, subdivision (b) enhancement in the sentencing minute order and abstract of judgment must be stricken. No enhancement under that provision was alleged, admitted, or found true. We will order the minute order and abstract of judgment corrected accordingly.

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[2] He also claims he is unable to pay a $300 suspended parole revocation fine, but that issue is not ripe until and if his parole is revoked. (§ 1202.45, subd. (c).)

We will also order the abstract of judgment corrected to add parenthesis around the 20-year term listed for the section 12022.53, subdivision (c) enhancement for stayed count 8. The other enhancements for stayed counts in the abstract of judgment are signified by parenthesis around those terms, so adding parenthesis to the enhancement term on count 8 will make the abstract of judgment consistent.

Barraza contends the abstract of judgment did not list the five-year enhancement pursuant to section 667, subdivision (a)(1). He is wrong—it is listed on the first page. He also contends the trial court's oral pronouncement of judgment was incorrect because the court "appears" to have imposed the section 667, subdivision (a) enhancement on counts 2, 6, and 10. Again, he is wrong. In the reporter's transcript, the court pronounced the sentence of four years on the final count 15, which was stayed. The court ordered "[t]he stay to become permanent upon completion of the sentence in counts 02, 06 and 10." In the next sentence summarizing Barraza's total sentence, the court stated, "Pursuant to Penal Code section 667 subdivision (a) subdivision (1), the court will impose a consecutive five years in state prison for a total state prison commitment of 53 years." This pronouncement was correct.

DISPOSITION

The trial court is directed to correct the sentencing minute order and abstract of judgment to strike references to a section 667.5, subdivision (b) enhancement. The trial court is also directed to correct the abstract of judgment by adding parenthesis around the 20-year term listed for the section 12022.53, subdivision (c) enhancement for count 8. The matter is remanded for resentencing for the trial court to exercise its discretion whether to strike the section 667, subdivision (a) enhancement.

In all other respects, the judgment is affirmed.

BIGELOW, P. J.

We concur:

GRIMES, J.

WILEY, J.