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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.

ARTURO SCOTT FERNANDEZ,

Defendant and Appellant.

B235679

(Los Angeles County
Super. Ct. No. TA 115138)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Shultz, Judge. Affirmed.

Kari E. Hong, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Roberto L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

A jury convicted Arturo Scott Fernandez of misdemeanor assault, assault by force likely to produce great bodily injury (GBI), and resisting, obstructing, or delaying a peace officer without force or violence. The court found that appellant had suffered a prior strike in 1998 based on a juvenile adjudication for assault. Appellant contends that the trial court erred when it found the juvenile adjudication qualified as a strike. Additionally, he seeks an independent review of the trial court's in camera *Pitchess*¹ hearing to determine whether any discoverable documents were not provided to the defense. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Because this appeal does not raise an issue regarding the facts of the substantive offenses, we omit the traditional statement of facts in favor of an abbreviated statement of the facts. (See *People v. White* (1997) 55 Cal.App.4th 914, 916, fn. 2.) On November 2, 2010, appellant repeatedly struck Joe Orozco and threw beer bottles at Nicanor Mangunay and David Abaya in front of a 7-Eleven in Carson. When a Los Angeles Sheriff's Deputy arrived at the scene and intervened, appellant resisted and assaulted the deputy.

The amended information charged appellant with seven counts: (1) one count of assault upon a peace officer or firefighter; (2) one count of assault by force likely to produce GBI upon Orozco; (3) two counts of assault with a deadly weapon, one upon Mangunay and one upon Abaya; (4) two counts of criminal threats, one against Mangunay and one against Abaya; and (5) one count of resisting an executive officer. The amended information alleged that appellant had served two prior prison terms and had a prior strike. The prior strike was alleged to be a 1998 juvenile adjudication for a violation of Penal Code section 245, former subdivision (a)(1).

Appellant filed a *Pitchess* motion before trial requesting discovery of personnel information for two sheriff's deputies, Deputies Gin and Logeman. The court found good cause to conduct an in camera hearing of Deputy Gin's personnel records for

¹ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

complaints of use of force, dishonesty, and falsification. It found good cause to conduct an in camera hearing of Deputy Logeman's personnel records for complaints of dishonesty and falsification. The court conducted the in camera hearing and ordered disclosure of some discoverable information.

At trial, the jury convicted appellant on three of the counts as follows: (1) the lesser included offense of misdemeanor assault (instead of assault upon a peace officer or firefighter); (2) assault with force likely to produce GBI upon Orozco; and (3) the lesser included offense of resisting, obstructing, or delaying a peace officer without force or violence (instead of resisting an executive officer). The jury acquitted appellant on the remaining counts.

A bench trial on the alleged prior strike took place after the jury trial. The prosecution presented evidence of a petition under section 602 of the Welfare and Institutions Code filed on June 15, 1998. The petition alleged in count one that on February 22, 1998, when appellant was 16 years old, he committed the felony offense of "ASSAULT WITH A DEADLY WEAPON AND BY MEANS OF FORCE LIKELY TO PRODUCE [GBI]" in violation of Penal Code section 245, former subdivision (a)(1).² More specifically, the petition alleged that appellant "willfully and unlawfully commit[ted] an assault upon [the victim] with a deadly weapon, to wit, ICE PICK, and by means of force likely to produce [GBI]." In count two, the petition alleged that appellant committed the crime of possession of a deadly weapon (an ice pick) in violation of Penal Code former section 12020, subdivision (a). A minute order from the case showed that appellant admitted count one of the petition for assault and the second count was dismissed. Appellant was committed to the California Youth Authority. A referral history from the California Department of Corrections and Rehabilitation, Division of

² The current version of Penal Code section 245 addresses assault with a deadly weapon and assault by means of force likely to produce [GBI] in different subdivisions; subdivision (a)(1) penalizes assault with a deadly weapon, while subdivision (a)(4) penalizes assault by means of force likely to produce [GBI]. In 1998, however, former subdivision (a)(1) penalized both assault with a deadly weapon and assault by means of force likely to produce great bodily injury.

Juvenile Justice, indicated that appellant was committed based on his conviction for “aslt deadly weapon.” The court found the prior strike allegation based on this juvenile adjudication to be true.

The court sentenced appellant to eight years in state prison, consisting of four years for the assault upon Orozco, doubled for the prior strike pursuant to the three strikes law. The court sentenced him to concurrent county jail terms of nine months each for the two remaining counts on which he was convicted.

DISCUSSION

1. Substantial Evidence Supported the Trial Court’s Finding That the Prior Juvenile Adjudication Qualified as a Strike

Appellant contends that the prosecution failed to prove his prior juvenile adjudication was a serious felony within the meaning of the three strikes law because it failed to establish that he used a deadly weapon or personally caused GBI. We disagree.

A prior juvenile adjudication constitutes a strike under the three strikes law if (1) the juvenile was 16 years old or older at the time of the prior offense; (2) section 707, subdivision (b) of the Welfare and Institutions Code lists the prior offense, or the prior offense would be a qualifying strike if committed by an adult; (3) the court found the juvenile to be a fit and proper subject to be dealt with under the juvenile court law; and (4) the court adjudged the juvenile to be a ward of the court within the meaning of Welfare and Institutions Code section 602. (Pen. Code, §§ 667, subd. (d)(3), 1170.12, subd. (b)(3).)

Appellant challenges only the second requirement -- that the prior offense be *either* a qualifying strike if committed by an adult *or* listed in section 707, subdivision (b) of the Welfare and Institutions Code. Appellant’s prior adjudication was for violating Penal Code section 245, former subdivision (a)(1). At the time, in 1998, that subdivision of the statute made it a felony offense to “commit[] 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 [GBI].” (Pen. Code, § 245, former subd. (a)(1).)

A prior “serious” or “violent” felony conviction committed as an adult counts as a strike under the three strikes law. (Pen. Code, §§ 667, subds. (d)(1), (e)(1), 1170.12, subds. (b)(1), (c)(1); *People v. Delgado* (2008) 43 Cal.4th 1059, 1065.) Assault with a deadly weapon constitutes a serious felony for these purposes. (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1), 1192.7, subd. (c)(31); *People v. Delgado, supra*, at p. 1065.) Assault in which the defendant “*personally* inflicts [GBI] on any person, other than an accomplice” is also a serious felony, though assault merely by means *likely to produce* GBI, without the additional elements of personal and actual infliction, does not constitute a serious felony. (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1), 1192.7, subd. (c)(8).)

Section 707, subdivision (b)(14) of the Welfare and Institutions Code lists “[a]ssault by any means of force likely to produce [GBI].” For purposes of section 707, subdivision (b), this type of assault includes the offense of assault with a deadly weapon. (*In re Sim J.* (1995) 38 Cal.App.4th 94, 97-98.)

The prosecution must prove each element of a sentencing enhancement beyond a reasonable doubt. (*People v. Delgado, supra*, 43 Cal.4th at p. 1065.) “A common means of proving the fact and nature of a prior conviction is to introduce certified documents from the record of the prior court proceeding and commitment to prison [Citations.] [¶] “[The] trier of fact is entitled to draw reasonable inferences from certified records offered to prove a defendant suffered a prior conviction” (*Id.* at p. 1066.) If the prior conviction or adjudication was for an offense that can be committed multiple ways, and the record does not disclose how the defendant committed the offense, the court must presume the conviction was for the least serious form of the offense. (*Ibid.*) We review the record in the light most favorable to the judgment to determine whether the trial court’s findings regarding prior convictions are supported by substantial evidence. (*Id.* at p. 1067.)

Here, while appellant could commit the offense in multiple ways -- by either using a deadly weapon or using force likely to produce GBI -- there was no ambiguity because the record clearly disclosed how appellant committed the offense. Moreover, the trial court did not err in finding that this offense constituted a strike. The record demonstrated

that appellant was charged with “assault with a deadly weapon *and by means of force likely to produce [GBI]*” when he committed an assault against another with an ice pick. (Italics added.) It also demonstrated that appellant admitted this count. Assault by any means of force likely to produce GBI is listed as a qualifying strike by virtue of section 707, subdivision (b)(14) of the Welfare and Institutions Code. This section does not require that appellant actually or personally inflict GBI. Thus, appellant’s argument that there was no evidence he personally caused [GBI] is irrelevant.

Even if appellant’s offense were not a qualifying strike under the Welfare and Institutions Code, it was otherwise a “serious” felony that qualified as a strike. Appellant was charged with and admitted an assault that was both with a deadly weapon and with force likely to produce GBI. When, as here, the offense is alleged in the conjunctive, the single offense of assault with a deadly weapon is charged. (*People v. Flynn* (1995) 31 Cal.App.4th 1387, 1394.) “In such instance the phrase ‘[and] by means of force likely to produce [GBI]’ simply describes the manner in which the weapon is used and serves to explain why it thereby constitutes a deadly weapon.” (*Ibid.*) And assault with a deadly weapon is a “serious” felony constituting a strike within the meaning of the three strikes law. Despite appellant’s argument to the contrary, the relevant statutes do not require that he *personally* used the deadly weapon for the offense to qualify as a strike. (See Pen. Code, §§ 667, subd. (d)(1), 1170.12, subd. (b)(1), 1192.7, subd. (c)(31).)³ The evidence was sufficient to support the trial court’s finding that the prior adjudication was a strike.

2. The Trial Court’s Orders Regarding Disclosure of Pitchess Materials Were Correct

Peace officer personnel records and records concerning citizen complaints made against peace officers are confidential and are subject to discovery only under limited circumstances. (Pen. Code, § 832.7.) A defendant requesting confidential personnel records and complaints must make a good cause showing by affidavit setting forth the

³ Prior to the enactment of Proposition 21 in 2000, assault with a deadly weapon was not a serious felony for three strikes purposes unless the defendant personally used the deadly weapon. Proposition 21 changed that by adding simple assault with a deadly weapon as a serious felony. (*People v. Winters* (2001) 93 Cal.App.4th 273, 276-277.)

materiality of the requested information to the pending litigation. (Evid. Code, § 1043, subd. (b)(3).) If a defendant shows good cause, the court must conduct an in camera hearing to determine what information sought, if any, must be disclosed. (*People v. Gaines* (2009) 46 Cal.4th 172, 179.) A criminal defendant is entitled to discovery of all relevant documents or information in the confidential records of the peace officers accused of misconduct against the defendant, provided the information does not concern officer conduct occurring more than five years before the incident, the results of internal police investigations, or facts with no practical benefit to the defense. (*Id.* at pp. 179, 182; see also Evid. Code, § 1045, subd. (b).) This encompasses not only evidence that would be admissible at trial, but also evidence that may lead to admissible evidence or evidence that is pertinent to the defense. (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1048-1049; *City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 53.) We review the trial court's determination regarding the discoverability of material in peace officer personnel files for an abuse of discretion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228.)

We are authorized to conduct an independent examination of the in camera *Pitchess* proceedings to determine whether the trial court wrongly withheld any responsive documents. (*People v. Mooc, supra*, 26 Cal.4th at p. 1228.) We have thus reviewed the record of the trial court *Pitchess* proceedings, including a sealed reporter's transcript of the in camera review of the deputies' personnel records. We conclude the trial court correctly evaluated the *Pitchess* materials and its orders regarding the disclosure of *Pitchess* materials were correct.

DISPOSITION

The judgment is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.