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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 EIGHT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DONNELL LAMONT SHELL,<br><br>Defendant and Appellant. | B284283<br><br>(Los Angeles County Super. Ct. No. BA452459) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig Richman, Judge. Affirmed.

Karyn H. Bucur, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Blythe J. Leszkay and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Donnell Lamont Shell was charged with 17 counts in relation to events occurring between December 8 and 9, 2016. It was also alleged that he suffered a prior strike conviction, and that some of the offenses involved the infliction of great bodily injuries. Defendant pled no contest to one count of injuring his cohabitant, one count of abusing a child, and one count of hit and run driving resulting in property damage, and he admitted a prior strike. In exchange, the prosecutor dismissed 14 counts and agreed to an aggregate term of seven years in prison. The court imposed the agreed upon sentence of seven years, consisting of the low term of two years for injuring a cohabitant, doubled due to the strike, plus three years for the great bodily injury (GBI) enhancement. The court imposed concurrent sentences for the child abuse and hit and run counts.

Defendant now appeals the imposition of the three-year GBI enhancement, and asks this court to remand the case for resentencing, or to strike the enhancement from the abstract of judgment. He contends that since he did not admit the truth of the GBI allegation, and the trial court did not find the allegation to be true, the three-year GBI enhancement is unauthorized. Respondent contends the three-year enhancement is authorized since defendant bargained for and agreed to a seven-year sentence, which included three years for the enhancement, in exchange for the prosecutor dismissing 14 charges against him. Thus, having received the benefit of his bargain, respondent argues defendant is estopped from challenging the sentence. Respondent further contends that defendant essentially admitted the GBI allegation when he stated on the record that he wanted

to enter a plea on the terms and conditions set forth in the agreement. We agree and affirm.

## BACKGROUND

Defendant and Shayna T. have seven children in common. From an incident involving defendant, Shayna T., their children, and Shayna T.'s mother, defendant was charged with 17 separate counts. Defendant was charged with one count of injuring a cohabitant with a prior conviction (Pen. Code, § 273.5, subd. (f)(1); count 2),[1] two counts of child abuse (§ 273a, subd. (a); counts 3 & 4), one count of cruelty to child by inflicting injury (§ 273a, subd. (b); count 6), one count of assault by means likely to produce GBI (§ 245, subd. (a)(4); count 18), one count of assault with a deadly weapon (§ 245, subd. (a)(1); count 19), and 11 misdemeanor counts of hit and run driving resulting in property damage (Veh. Code, § 20002, subd. (a); counts 7-17).

As to count 2, the information alleged that defendant personally used a deadly and dangerous weapon, that defendant inflicted GBI, that the crime was a serious felony, and that defendant had suffered a prior strike (§§ 12022, subd. (b)(1), 12022.7, subd. (e), 667, subd. (a)(1), 1170.12). Counts 3, 4, and 19 also included strike allegations. Count 19 also included GBI allegations.

In a negotiated plea, defendant pled no contest to counts 2, 3, and 7 and agreed to a prison term of seven years.[2] In relation to count 2, defendant admitted his prior strike conviction but was

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

[2] Defendant made the initial proposal of a plea agreement with a term of seven years.

never prompted to admit a GBI enhancement, and the trial court did not find it true.

Though the trial court did not explicitly prompt defendant to admit the GBI enhancement, the court did explain the sentence to defendant, as follows, before taking defendant's plea:

> "Okay. So Mr. Shell, in count 2, you are charged with corporal injury to spouse, cohabitant[,] child's[] parent, with a prior conviction. So you're going to plead to that count, you're going to admit that domestic violence prior conviction, you're going to admit your strike prior conviction. That's that 422. And you're going to admit a great bodily injury during the course of the domestic violence. And that's how we're going to get to seven years."

The court further explained to defendant that, because of the GBI allegation, his conviction on count 2 would constitute a strike.

On two occasions, the court asked defendant if he understood the calculation of his sentence, and defendant responded that he did. Defendant also expressly stated he wanted to go forward with the plea:

> "THE COURT: Okay. So with the way [the prosecutor's] formed the seven, at 85 percent, are you willing to take that deal that you offered? Seven, at 85 percent? 'Yes' or 'no'?
>
> "DEFENDANT: Yes."

The remaining counts were dismissed with a *Harvey* waiver. (*People v. Harvey* (1979) 25 Cal.3d 754.) Defendant filed a timely notice of appeal, and his request for a certificate of probable cause was granted.

## DISCUSSION

Defendant argues that the imposition of the three-year consecutive term pursuant to section 12022.7, subdivision (e), is unauthorized since he did not admit the truth of the GBI allegation, the allegation was not proven, and the trial court did not find the allegation to be true. Respondent acknowledges defendant was never asked to explicitly admit the GBI enhancement but contends defendant received the benefit of his bargain and is estopped from challenging the sentence. Respondent further contends that defendant essentially admitted the GBI allegation when he stated on the record that he wanted to enter a plea on the terms and conditions set forth in the agreement.

The only issue on appeal is whether the three-year GBI enhancement is unauthorized. For this purely legal question, we apply the de novo standard of review. (*People v. Buttram* (2003) 30 Cal.4th 773, 792 ["The voluntariness of the waiver [of a defendant's constitutional rights through a plea bargain] is a question of law which appellate courts review de novo."].)

"A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles." (*People v. Shelton* (2006) 37 Cal.4th 759, 767.) Defendant faced the prospect of a prison term far greater than seven years. Instead of going to trial, defendant entered a negotiated plea for a stipulated sentence of seven years in exchange for the prosecutor agreeing to dismiss 14 charges against him. The trial court explained how the seven-year sentence was calculated, including three years for the GBI enhancement, and defendant told the court he understood the consequences of the plea and entered it knowingly and intelligently.

In *People v. Hester* (2000) 22 Cal.4th 290 (*Hester*), the defendant broke into his former girlfriend's residence, stabbed her new boyfriend, and battered her. Instead of going to trial, the defendant entered no contest pleas on five counts and admitted he personally used a dangerous or deadly weapon in exchange for an agreed prison term of four years. (*Id.* at p. 293.) On appeal, the defendant contended the sentence was unauthorized because it violated the prohibition of section 654 against imposing more than one punishment where two offenses were committed with a single intent and objective. (*Hester,* at p. 294.)

*Hester* held, "Where the defendants have pleaded guilty in return for a *specified* sentence, appellate courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction." (*Hester*, *supra*, 22 Cal.4th at p. 295; see also *People v. Nguyen* (1993) 13 Cal.App.4th 114, 122-123.) "The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to 'trifle with the courts' by attempting to better the bargain through the appellate process." (*Hester*, at p. 295; *People v. Beebe* (1989) 216 Cal.App.3d 927, 932.)

Here, defendant contends the sentence was unauthorized for the failure to prove or obtain an admission the GBI allegation was true. In *Hester*, the defendant contended the sentence was unauthorized because it violated the prohibition of section 654. (*Hester, supra,* 22 Cal.4th at p. 293.) The distinction is without a difference, because *Hester* establishes the principle that courts will not set aside a plea as unauthorized, even when there is sentencing error, where the defendant pled to a specified sentence and got the benefit of the bargain.

Moreover, although defendant insists his sentence is unauthorized, he does not contend the trial court lacked fundamental jurisdiction. Nor could he. A court lacks fundamental jurisdiction if it is "entirely without power over the subject matter or the parties." (*In re Harris* (1993) 5 Cal.4th 813, 836.) Here, there is no question the trial court had jurisdiction over defendant and the charges raised in the information, including the GBI allegation.

Like in *Hester*, the plea here was entered by defendant knowingly and intelligently and with an understanding of the consequences of his plea and the risks he was thereby avoiding. As a result, the plea is not unauthorized and we will not set it aside.

Even if defendant were not estopped from challenging his sentence, we agree with respondent that defendant sufficiently admitted the GBI allegation. *People v. Moore* (1992) 8 Cal.App.4th 411, is instructive. In *Moore*, the defendant said he was "going to admit" he suffered a prior conviction, but did not expressly do so. (*Id.* at p. 415.) Nonetheless, the trial court imposed a three-year sentence enhancement based on the prior conviction. (*Ibid.*) On appeal, the defendant argued the enhancement was improper because he did not actually admit the prior conviction. The court rejected the argument, explaining that "although the record does not reflect a model admission, [the defendant] unequivocally expressed his intention to admit the . . . prior." (*Id.* at p. 422.)

Here, too, defendant unequivocally expressed his intention to admit the GBI allegation. The plea agreement was proposed by defendant, and the trial court explained in detail its terms, including the imposition and effect of the GBI enhancement.

Defendant twice stated he understood how his sentence would be calculated under the plea agreement, and then informed the court he wanted to go forward with it. Defendant proceeded to waive his constitutional rights and enter his pleas in accordance with the terms of the agreement. Although defendant did not expressly admit the GBI allegation as part of those pleas, he did not object when the trial court imposed the three-year GBI enhancement. Nor did he raise the issue in his subsequent motion to recall sentence and petition for writ of error coram nobis. It is clear from this record that defendant understood the terms of the plea agreement and fully intended to admit the GBI allegation when entering his pleas. Under these circumstances, we find defendant sufficiently admitted the GBI allegation. (See *People v. Niendorf* (1961) 197 Cal.App.2d 594, 599 ["A defendant can . . . actually personally put in a plea of guilty without using the magic words, 'I plead guilty.' "]; *People v. Reeves* (1966) 64 Cal.2d 766, 772 [plea sufficient where the defendant acquiesced in defense counsel's recitation of the plea]; *People v. Martin* (1964) 230 Cal.App.2d 62, 64 [same].)

Moreover, it is clear the failure to elicit an explicit admission to the GBI allegation was simply an oversight; had it been brought to the court's attention, we have no doubt it would have been corrected immediately. As such, to the extent there was error, it was essentially one of procedure. "No judgment shall be set aside, or new trial granted, in any cause, . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) Here,

defendant has not shown a mischarge of justice, and we will not set aside the judgment.

**DISPOSITION**

The judgment is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

GOODMAN, J.*

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