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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

NANCY JENNIFER ARELLANO,

Defendant and Appellant.

B269299

(Los Angeles County
Super. Ct. No. KA109694)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Bruce F. Marrs, Judge. Affirmed.

Mark S. Devore, 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, Assistant
Attorney General, Susan Sullivan Pithey and Heather B.
Arambarri, Deputy Attorneys General, for Plaintiff and
Respondent.

INTRODUCTION

Defendant Nancy Arellano appeals from the judgment entered following her conviction by jury of one count of elder abuse. She contends the trial court erred in failing to instruct the jury on unanimity principles. She further argues the court should have granted her motion to strike her prior conviction for sentencing purposes. We find no error and therefore affirm.

FACTUAL AND PROCEDURAL HISTORY

I. Procedural background

On June 11, 2015, the Los Angeles County District Attorney (the People) filed an information charging defendant with one count of elder abuse, infliction of injury, in violation of Penal Code section 368, subdivision (b)(1).¹ The offense was allegedly committed on April 23, 2015 against Esperanza Rios, age 76. The information also alleged that the victim suffered great bodily injury, a sentencing enhancement pursuant to section 368, subdivision (b)(2). In addition, the information alleged defendant suffered a prior conviction of a serious or violent felony within the meaning of sections 667, subdivision (d) and 1170.12, subdivision (b).

On November 4, 2015, a jury found defendant guilty as charged on count one. The jury further found true the special allegation that the victim was over the age of 70, but found not true the allegation that she suffered great bodily injury.

Defendant waived her right to trial on her prior strike conviction and subsequently admitted it. At sentencing, defendant moved to dismiss the prior strike allegations in the interest of justice pursuant to section 1385. The court denied the

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

motion and sentenced defendant to a base term of 3 years in state prison on count one, with an additional three years for the prior conviction. Defendant timely appealed.

II. *Evidence at trial*

Defendant lived with her 76-year-old mother, Esperanza Rios, and her mother's husband, Gerardo Salvador. At the time of the incident, defendant had been living with Rios and Salvador for about a year while she was going through a divorce. Rios testified at trial that during that period, defendant verbally assaulted her a "few times." Salvador also testified that defendant would "sometimes" become verbally abusive to Rios, saying "bad words" and upsetting Rios. He saw defendant screaming at Rios "about two or three times" after defendant had been drinking.

On April 23, 2015, Rios told defendant to clean her room. As Rios walked away, defendant pushed her from behind, causing Rios to fall, hitting her shoulder against the floor and twisting her arm.

Rios went to the emergency room the following day because she was continuing to feel pain in her neck and shoulder. She told the staff at the emergency room that she fell, but did not tell them she was pushed because she did not want defendant to go to jail. Rios continued to have "pretty severe" pain and restricted movement in her shoulder and arm, so she followed up with her primary physician, who referred her to an orthopedic specialist as well as to a physical therapist. The specialist diagnosed Rios with a rotator cuff tear.

Guillermo De La Torre provided physical therapy for Rios starting in May 2015. During her first visit, Rios disclosed that she was pushed by her daughter. De La Torre told Rios that he

was a mandated reporter and therefore needed to contact a social worker. Rios responded that she understood and she needed “help getting her daughter out of the house.”

Sean Cariaga, deputy sheriff, responded to the elder abuse call initiated by De La Torre. He spoke with Rios at the hospital on May 11, 2015 during her physical therapy appointment. He testified that Rios “didn’t seem happy to be speaking to me.” According to Cariaga, Rios told him “she had been in a verbal altercation with her daughter, and that during that altercation she had turned around to walk away from her daughter, and her daughter pushed her, causing her to fall forward and land on her shoulder.” Rios also told Cariaga that defendant “had become very abusive towards her verbally,” defendant “had been drinking a lot, and that was probably the cause for the abuse,” and that Rios had asked defendant to leave the house but defendant refused. Cariaga helped Rios obtain a restraining order against defendant. However, when he arrived at Rios’s residence for a follow-up the next day, he was “surprised” to find defendant present. Cariaga arrested defendant and she “started yelling and screaming.” When Cariaga told defendant she was being charged with elder abuse, she responded by yelling, “I’m gonna take that to the box. I’d like to see her testify.”

The prosecution also presented recordings of two telephone calls between defendant and her friend “Alex Doe.” Defendant placed these calls from jail on May 18, 2015. In the calls, defendant asked Alex Doe to speak with Rios before “the investigators get to her” and to be careful not to be recorded doing so. Defendant also told Alex Doe to testify that “you were there . . . and you’d seen [*sic*] her trip herself.”

Defendant did not present any evidence at trial.

DISCUSSION

I. *Unanimity instruction*

Defendant contends that the trial court erred in failing to give a unanimity instruction to the jury. She claims that because the prosecutor based the elder abuse charge on two different acts—the physical pushing and the verbal abuse of Rios—the jury could have found defendant guilty based on either act, and may not have unanimously agreed as to one of them. We conclude no unanimity instruction was required.

A. *Legal principles*

A jury verdict must be unanimous in a criminal case. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Thus, “[w]hen an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act.” (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) The unanimity requirement “is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.” [Citation.]” (*People v. Russo, supra*, 25 Cal.4th at p. 1132.) Where required, a unanimity instruction must be given sua sponte. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 274–275.)

A conviction for felony elder abuse requires proof of the following elements: (1) the defendant “willfully causes or permits any elder . . . adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering”; (2) the defendant’s conduct

occurs “under circumstances or conditions likely to produce great bodily harm or death”; and (3) the defendant “knows or reasonably should know” that the other person is an elder adult. (§ 368, subd. (b)(1).) The lesser included offense of misdemeanor elder abuse is such abuse perpetrated without the presence of the second element, i.e., without “circumstances or conditions . . . likely to produce great bodily harm or death.” (§ 368, subd. (c); see also *People v. Racy* (2007) 148 Cal.App.4th 1327, 1334–1335.)

B. *Factual background*

At the close of the People’s evidence, defendant moved to dismiss the case based on insufficiency of the evidence. In response to questioning by the court, the prosecutor confirmed the People were proceeding “on the theory that the defendant willfully inflicted unjustifiable physical pain or mental suffering on an elder adult,” caused by “the act of pushing and knocking her down and causing actual injury,” as well as “the verbal abuse that all witnesses except for Ms. Rios pretty much testified [about].”

In discussing the elements of the offense in closing, the prosecutor argued that the first element was principally satisfied by defendant’s act of purposefully pushing her mother, but added that “you can also circumstantially conclude that based on the defendant’s drinking, the defendant’s verbal abuse of her mother over that period of time, and that Ms. Rios expressed that she was in fear and wanted her out of the home, that Ms. Rios was also suffering mentally from the defendant.” In turning to the second element, whether defendant’s conduct occurred under circumstances likely to produce great bodily harm or death, the prosecutor focused solely on the physical assault and did not suggest that defendant’s verbal conduct could satisfy this

element. In summation, she again argued the People had to prove only that defendant “acted purposely in pushing her mother,” then added that “I don’t have to prove that there was actual injury; only that there was pain or mental suffering. And you as jurors, it doesn’t have to be both, you can say there was pain or mental suffering, or both.” She further argued that the conduct produced great bodily harm, in support of the special allegation.

The court instructed the jury as to the elements of felony elder abuse, as well as the lesser included misdemeanor offense (CALJIC Nos. 9.38, 16.172). No unanimity instruction was requested or given.

C. *No instruction required*

Defendant argues that the prosecutor relied on two alternate theories to support the charge of elder abuse—first, that Rios suffered physical pain caused by defendant’s act of pushing her to the ground, and second, that Rios experienced mental suffering caused by defendant’s verbal abuse. Because the prosecutor failed to choose between these theories, defendant asserts the trial court was required to instruct the jury on unanimity principles. She contends the court’s failure to do so was prejudicial error.

The Attorney General responds that no instruction was necessary because the evidence presented at trial could support a felony conviction only if based on defendant’s physical conduct. Defendant agrees that the verbal assault theory could not sustain a felony conviction, but argues that presentation of this theory by the prosecutor at trial requires reversal of the conviction, citing *People v. Guiton* (1993) 4 Cal.4th 1116 (*Guiton*).

We agree that *Guiton, supra*, 4 Cal.4th 1116 is instructive here, but find that it supports affirming defendant's conviction. In *Guiton, supra*, 4 Cal.4th at p. 1119, the defendant's conviction was based on a finding that he either sold or transported cocaine. Although the prosecutor argued both theories to the jury (*id.* at p. 1127), it was undisputed on appeal that there was insufficient evidence from which a jury could conclude defendant sold cocaine (*id.* at p. 1120). The Court of Appeal reversed the conviction because it could not determine from the record whether the jury verdict rested on the valid basis or the invalid one. (*Ibid.*) The California Supreme Court disagreed, drawing a distinction between a *factually* unsupported and a *legally* unsupported theory. (*Id.* at pp. 1128-1129.)

First, the *Guiton* court considered the “*Green* rule,” set forth in *People v. Green* (1980) 27 Cal.3d 1, overruled on other grounds by *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 and *People v. Martinez* (1999) 20 Cal.4th 225, 239. There, a kidnapping charge could have been based on any one of three “distinct segments of asportation of the victim. [Citation.]” (*Guiton, supra*, 4 Cal.4th at p. 1121.) Upon review, the court found the trial court misinstructed the jury as to one segment and that the short distance of a second segment was “insufficient as a matter of law to support’ the kidnapping verdict. [Citation.]” (*Ibid.*) The *Green* court held: “[W]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand.” (*Green, supra*, at p. 69.)

Next, *Guiton* examined the “*Griffin* rule,” based on the United States Supreme Court decision in *Griffin v. United States* (1991) 502 U.S. 46 (*Griffin*). (*Guiton, supra*, 4 Cal.4th at p. 1122-1123.) In *Griffin*, the petitioner and several co-defendants were charged with a conspiracy, which was alleged to have had two objects. Although there was sufficient evidence to connect the petitioner only to one object, the jury was instructed that it could convict petitioner “if it found her to have participated in *either one* of the two objects of the conspiracy.” (*Griffin, supra*, 502 U.S. at pp. 47-48, italics in original.)

The *Griffin* court upheld the verdict, drawing “a distinction between a mistake about the law, which is subject to the rule generally requiring reversal, and a mistake concerning the weight or the factual import of the evidence, which does not require reversal when another valid basis for conviction exists.” (*Guiton, supra*, 4 Cal.4th at p. 1125, citing *Griffin, supra*, 502 U.S. at p. 59.) As the court reasoned: “Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence [citation].” (*Griffin, supra*, 502 U.S. at p. 59, italics in original.)

The *Guiton* court then proceeded to “harmonize[]” the *Griffin* and *Green* rules as follows: “If the inadequacy of proof is

purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground. But if the inadequacy is legal, not merely factual, that is, when the facts do not state a crime under the applicable statute, as in *Green*, the *Green* rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground.” (*Guiron, supra*, 4 Cal.4th at p. 1129.) In applying these principles to the facts of the case, the court concluded whether the evidence showing the defendant sold cocaine was sufficient was “a purely factual question”; thus, the *Griffin* rule applied. (*Id.* at p. 1131.)

Similarly, here, the parties agree that there was insufficient evidence to support a conviction for felony elder abuse based purely on the verbal abuse defendant inflicted on her mother. In particular, there was no evidence from which a reasonable jury could conclude that Rios was subject to verbal abuse “under circumstances or conditions likely to produce great bodily harm or death,” the requisite element distinguishing a felony offense from a misdemeanor. (§368, subds. (b)(1), (c).) This issue falls squarely under the *Griffin* rule—the jury was presented with two theories supporting conviction for felony elder abuse, one of which was factually unsupported and one of which was supported by sufficient evidence. As such, reversal is not required as long as there is no affirmative basis for concluding that the jury relied on the factually inadequate theory. (*Guiron, supra*, 4 Cal.4th at p. 1129; see also *People v. Llamas* (1997) 51 Cal.App.4th 1729, 1740.)

The record in this case reveals no basis to conclude that the jury convicted defendant based on the verbal abuse alleged.

Indeed, the prosecutor did not even suggest how the vague details regarding defendant's verbal abuse could meet the second element of the felony offense, which required that defendant's conduct occur "under circumstances or conditions likely to produce great bodily harm or death." Instead, the prosecutor's statements during closing argument regarding this element were focused solely on defendant's physical act of pushing her mother. While the prosecutor did argue that the jury could find there was physical pain "or mental suffering . . . it doesn't have to be both," these arguments were entirely directed toward the first element of the offense,² and her primary focus during the course of the entire closing argument was the undisputed evidence that defendant pushed Rios, causing her to fall and injure herself and requiring months of medical treatment. Further, the jury's finding that defendant was guilty of the felony, rather than the misdemeanor, supports the conclusion that the jurors relied on the physical act by defendant to reach their verdict. Thus, because it was not reasonably possible that the jury disagreed as to what conduct by defendant supported a finding of felony elder abuse, no unanimity instruction was necessary. (See, e.g., *People v. Brown* (1991) 234 Cal.App.3d 918, 935 ["a unanimity instruction is unnecessary 'unless there is evidence based on which reasonable jurors could disagree as to which act the defendant committed' [citation]"]; *People v. Burns* (1987) 196 Cal.App.3d 1440, 1458 ["If under the evidence presented such

² These comments were presumably directed toward both the felony and the lesser included misdemeanor charge, as both require proof of the first element under section 368, and the jury was instructed as to both.

disagreement is not reasonably possible, the instruction is unnecessary. [Citations.]”].)

II. *Romero* motion

Defendant contends the court abused its discretion in denying her *Romero*³ motion to dismiss her prior strike conviction for the purposes of sentencing. We disagree.

A. *Factual background*

At sentencing, defendant moved to strike her prior strike conviction, which was based on a 1993 charge of assault with a deadly weapon in violation of section 245, subdivision (a)(1). She also suffered a felony conviction for driving under the influence of alcohol (DUI) and causing bodily injury (Veh. Code, § 23153, subd. (a)) in connection with the same incident. Defendant acknowledged that she had two subsequent felony DUI convictions in 2001 and 2004 (Veh. Code, § 23152).⁴ She urged the court to dismiss her prior strike conviction based on the age of that conviction, the role played by alcohol in the majority of her offenses, her recent steps while in prison to address her issues with alcohol and anger management, and Rios’s request for leniency.

In opposing the motion, the People argued defendant had a long history of criminal offenses, starting in the 1980s with “theft-related offenses,” continuing with the three DUI-related felonies, and also including numerous misdemeanors, several within the past few years. The People also provided the following

³ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

⁴ Defendant notes that her subsequent DUI offenses were charged as felonies because they occurred within 10 years of a prior felony DUI conviction (Veh. Code, § 230550.5), rather than “based on the facts of those cases.”

underlying details of the prior strike conviction: defendant was drinking and driving and rear-ended the victim's car. The victim got out of the car to exchange information, and "the defendant basically accelerates at full speed towards the victim and victim ends up on the hood of the vehicle . . . holding on for dear life and ends up somehow falling off because of the reckless manner in which the defendant is driving in an attempt to flee the scene."

The trial court noted that defendant "[o]bviously . . . has some anger issues and . . . she's signed up for classes and is taking classes to attempt to get a handle on it." The court also noted that defendant had been involved in a number of programs and classes while in jail. While acknowledging that the prior strike was a "very old case, 21 years," the court agreed with the People that defendant had ongoing "anger type behavior" and continued criminal convictions up through 2014. As such, the court stated it could not find that defendant was "outside the spirit of *Romero*" and denied the motion to dismiss the strike prior.

B. *No abuse of discretion*

"A trial court may strike or vacate an allegation or finding under the Three Strikes law [§§ 667, subds. (b)-(i), 1170.12] that a defendant has previously been convicted of a serious and/or violent felony . . . 'in furtherance of justice' pursuant to Penal Code section 1385(a)." (*People v. Williams* (1998) 17 Cal.4th 148, 158 (*Williams*) (citing *Romero, supra*, 13 Cal.4th at p. 504).) In considering whether to do so, 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 . . . spirit [of the Three

Strikes law], 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.” (*Williams, supra*, 17 Cal.4th at p. 161.)

We review the trial court’s ruling for abuse of discretion. (*Williams, supra*, 17 Cal.4th at p. 152.) Given the “strong presumption that any sentence that conforms to these sentencing norms is both rational and proper,” a trial court only will abuse its discretion in denying a *Romero* request under “limited circumstances,” such as “where the trial court was not ‘aware of its discretion’ to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation],” or where the sentence under the Three Strikes law would “‘produce [] an ‘arbitrary, capricious or patently absurd’ result’ under the specific facts of a particular case. [Citation.]” (*People v. Carmony* (2004) 33 Cal.4th 367, 378.)

Defendant does not contend that any such circumstances occurred here. Instead, she argues that the court’s decision was based on “an overreaching focus on [defendant’s] prior criminal history without sufficient consideration of the ‘entire picture’ presented by [defendant], particularly toward her future prospects.” In essence, defendant contends the court placed too much weight on her prior history and not enough on her recent rehabilitative efforts. It is not the function of this court to reweigh these factors and substitute our judgment for that of the trial court. (See, e.g., *People v. Carmony, supra*, 33 Cal.4th at p. 377; *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.) Moreover, the record reveals that the trial court thoroughly considered the factors favoring defendant—including her recent attendance in classes and programs while incarcerated

and the age of the prior conviction—but concluded that the length and extent of defendant’s criminal history did not place defendant outside the spirit of the Three Strikes law, and therefore denied her motion. We find the trial court was well within its discretion in doing so.

DISPOSITION

The judgment of the trial court is affirmed.

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COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.