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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.

TARO HART,

Defendant and Appellant.

B267057

(Los Angeles County  
Super. Ct. No. SA089117)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark E. Windham, Judge. Affirmed in part, reversed in part, and remanded with directions.

Christine C. Shaver, 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, Assistant Attorney General, Mary Sanchez and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

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## **INTRODUCTION**

Appellant Taro Hart appeals from a five year prison sentence following his conviction for grand theft of personal property. Appellant contends his sentence, which was enhanced as a result of a prior conviction and prison term, was unauthorized because no evidence was submitted to prove the prior conviction. Respondent concedes the sentence was unauthorized, and requests this court remand the matter for a new trial on the prior conviction allegations. For the reasons set forth below, we conclude that the sentence was unauthorized and that remand is the appropriate remedy. Accordingly, we affirm the conviction, vacate the sentence, and remand for further proceedings.

## **FACTUAL BACKGROUND AND PROCEDURAL HISTORY<sup>1</sup>**

Appellant and the victim, Robert Grahm, were friends and fellow musicians. Appellant often visited Grahm, and he liked to look through Grahm's upstairs master closet where Grahm stored his watches and his gun collection. Grahm had shown some of the gun cases and watches to appellant.

On the evening of July 7, 2014, appellant brought Nerses Karagezyan and a woman to Grahm's house, introducing Karagezyan to Grahm as a potential investor in Grahm's music studio. While Grahm and Karagezyan were in the living room, appellant excused himself and went upstairs for approximately 15 minutes. Throughout the evening, both appellant and Karagezyan periodically left the living room.

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<sup>1</sup> As the facts of the underlying conviction are not relevant to the sole issue on appeal, we provide only a brief summary.

A few days later, Graham noticed that two watches and four guns were missing from his closet. After contacting appellant, Graham recovered one of the watches and one of the guns in a trashcan at a nearby drugstore. According to appellant, he had recovered the items from Karagezyan's house and had left them in the trashcan because he was scared the police would "arrest me right then and there for having a gun in my possession." Appellant was unable to recover any of the other stolen items, so he told Graham to "just call the police."

Graham filed a police report on the remaining missing property. Video surveillance from security cameras installed outside Graham's house showed Karagezyan holding the largest of Graham's gun cases and putting the case into his car.

On March 12, 2015, appellant and Karagezyan were charged by amended information with grand theft of personal property, to wit, a watch, (Pen. Code, § 487, subd. (a)),<sup>2</sup> grand theft of a firearm (§ 487, subd. (d)(2)), and first degree burglary (§ 459). It was further alleged that appellant had suffered a prior "strike" conviction within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12) and a prior conviction resulting in a prison term (§ 667.5, subd. (b)). A jury convicted appellant of the crime of grand theft of personal property. As to the remaining charges, the jury could not reach a verdict, and on the People's motion they were dismissed.

Following the jury's verdict on August 12, 2015, appellant agreed to waive his right to a jury trial on the prior conviction

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<sup>2</sup> Karagezyan is not a party to this appeal.

All further statutory citations are to the Penal Code, unless otherwise stated.

allegations. The trial court stated: “We can set that trial. If you want to do that tomorrow, that’s fine or this week. Otherwise put it over.” To permit defense counsel time to prepare a motion to strike the “strike” conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, the court continued the “priors trial” to September 8, 2015. On September 8, the court granted appellant’s motion to continue “sentencing” until September 29. On September 29, the matter was trailed until the next day.

On September 30, 2015, the trial court asked defense counsel if there was any legal cause to delay sentencing, and counsel responded, “No.” After hearing argument on appellant’s *Romero* motion, the court denied it. The court then sentenced appellant to the middle term of two years in state prison on the grand theft count, doubled pursuant to the Three Strikes law, plus one year for the prior prison term. No objection was raised to the lack of a trial on the prior conviction.

Appellant timely appealed.

## DISCUSSION

“The People must prove each element of an alleged sentence enhancement beyond reasonable doubt.” (*People v. Delgado* (2008) 43 Cal.4th 1059, 1065, citing *People v. Tenner* (1993) 6 Cal.4th 559, 566.) Here, the People offered no evidence on the prior conviction, appellant did not admit the truth of the prior conviction allegations, and the trial court made no true findings. Thus, it was not proven that appellant had suffered a prior “strike” conviction or a prior conviction resulting in a prison term. Accordingly, the sentencing enhancements, viz., doubling of the base term and adding one year, were unauthorized.

Respondent requests this court vacate the sentence and remand for a new trial on the prior conviction allegations. Appellant contends that no authority supports remand. As explained below, we conclude remand is the appropriate remedy.

Under section 1262, “If a judgment against the defendant is reversed, such reversal shall be deemed an order for a new trial, unless the appellate court shall otherwise direct.” More specifically, it is well-established that where “defects in the proof of the prior convictions” are capable of correction in a new trial, the “proper” procedure is to set aside the true findings and order a new trial on the challenged convictions and resentencing afterward. (*People v. Morton* (1953) 41 Cal.2d 536, 544.) Doing so, our Supreme Court explained, “carries out the policy of the statutes imposing ‘more severe punishment, proportionate to their persistence in crime, of those who have proved immune to lesser punishment’ [citation], and prevents defendants from escaping the penalties imposed by those statutes through technical defects in pleadings or proof. It affords the defendant a fair hearing on the charge, and if it cannot be proved he will not have to suffer the more severe punishment.” (*Id.* at pp. 544-545.)

The retrial of a prior conviction allegation in a noncapital case does not violate the double jeopardy protections of either the federal Constitution or the California Constitution. (*People v. Monge* (1997) 16 Cal.4th 826, 829 (*Monge*)). As our Supreme Court has explained, “Like a trial in which the defendant’s age or gender is at issue, the prior conviction trial merely determines a question of the defendant’s continuing status, irrespective of the present offense.” (*Id.* at p. 839.) “If a jury rejects the allegation, it has not acquitted the defendant of his prior conviction status. [Citation.] ‘A defendant cannot be “acquitted” of that status any

more than he can be “acquitted” of being a certain age or sex or any other inherent fact.” (*Id.* at p. 839, quoting *Durham v. State* (Ind. 1984) 464 N.E.2d 321, 324.) Thus, “the prosecution may reallege and retry that status in as many successive cases as it is relevant.” (*Monge, supra*, at p. 839.)

Nor is a retrial of prior conviction allegations barred by the constitutional requirement of fundamental fairness. (*People v. Barragan* (2004) 32 Cal.4th 236, 239 (*Barragan*).) In *Barragan*, a jury found true the allegation that the defendant had suffered a prior strike, but the Court of Appeal determined the evidence was insufficient to support the jury’s true finding and held that retrial was impermissible. (*Id.* at p. 240.) The People filed a petition for review, and the Supreme Court granted it. (*Ibid.*) In arguing against retrial, the defendant asserted that a new trial would violate the doctrine of fundamental fairness incorporated in the due process clauses of the federal and state Constitutions because it would “abrogate [his] right to be discharged from the penalties associated with a not true finding to that allegation.” (*Id.* at p. 244.) The Supreme Court rejected the defendant’s due process argument. Observing that “[e]ither a defendant has the requisite number of prior convictions, or he does not,” the court concluded that subjecting the defendant to “a second proceeding at which the State has the opportunity to show those convictions is not unfair and will enhance the accuracy of the proceeding by ensuring that the determination is made on the basis of competent evidence.” (*Barragan*, at p. 245, quoting *Caspari v. Bohlen* (1994) 510 U.S. 383, 396, italics omitted.)

Numerous courts of appeal have authorized a new trial of prior conviction allegations where the evidence presented in the trial court was insufficient to support the true findings on the

allegations. (See, e.g., *People v. Marin* (2015) 240 Cal.App.4th 1344, 1366 [reversing judgment as to true finding on strike allegation; allowing prosecutor to retry strike allegation on remand]; *People v. Roberts* (2011) 195 Cal.App.4th 1106, 1133-1134 [same]; *People v. Valenzuela* (2010) 191 Cal.App.4th 316, 324 [same].) Retrial on a prior conviction allegation also has been ordered where “no evidence of the two prior felonies was formally offered.” (*People v. Cheatham* (1968) 263 Cal.App.2d 458, 464.)

Appellant contends the cases permitting retrial of prior conviction allegations are inapposite, as here no trial was held. He cites no published decision -- and we have located none -- holding that under these circumstances, remanding for a trial on the prior conviction allegations is prohibited. More important, we discern no legal significance between the cases permitting retrial and the instant case. In those other cases, the People presented no evidence or insufficient evidence to prove the truth of the prior conviction allegations. Nevertheless, our high court permitted the People to retry the prior conviction allegations.

Appellant does not suggest he was denied notice of the prior conviction allegations. Nor did his counsel object when the sentence included enhancements based on those allegations. Indeed, the trial court’s ruling on the *Romero* motion would have been irrelevant in the absence of a prior strike. This is simply a case in which the prosecutor, the defense counsel, and the court mistakenly thought a trial had been held on the prior and proceeded to sentencing. On these facts, we discern no basis for denying the People the opportunity to prove the allegations. To the extent appellant was denied the opportunity to challenge the truth of the prior conviction allegations, in a new trial on the

prior he will be accorded that right, along with all other constitutional rights to which he is entitled.

### **DISPOSITION**

The conviction for grand theft of personal property is affirmed, the sentence is vacated, and the matter remanded to the trial court for further proceedings. On remand, the prosecution may elect to retry the prior conviction allegations. Regardless of whether the prosecution elects to retry the allegations, the court shall resentence appellant.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.