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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL G. MCCAW, Defendant and Appellant.	B266497 (Los Angeles County Super. Ct. No. GA082595)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cathryn F. Brougham, Judge. Affirmed in part, reversed in part, and remanded with directions.

Maureen L. Fox, 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, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Margaret E. Maxwell,

Supervising Deputy Attorney General, for Plaintiff and Respondent.

In 1999, defendant Michael G. McCaw entered into a plea bargain in New York in which he pleaded guilty to attempted third degree robbery. In 2011, McCaw was convicted of attempted manslaughter in California. The trial court found that McCaw's 1999 New York conviction for attempted third degree robbery qualified as a serious felony and a strike under California law, and enhanced McCaw's sentence accordingly. We have twice reversed the recidivism findings. In a third trial of the recidivism allegations, the court determined that the plea colloquy in connection with the New York conviction demonstrated the New York offense qualified as a serious felony and strike under California law.

We again reversed, holding the trial court's finding in the third recidivism trial—that the conduct underlying McCaw's New York conviction would constitute attempted robbery in California—constituted the type of judicial factfinding prohibited under the Supreme Court's interpretation of the Sixth Amendment in *Descamps v. United States* (2013) 570 U.S. 254 (*Descamps*); in *Descamps*, the Supreme Court held that the Sixth Amendment prohibits trial courts from making a disputed determination about what the defendant or state judge understood to be the factual basis of a prior plea. We reversed the trial court's determination that the New York conviction for attempted

third degree robbery constituted a prior serious felony conviction and a strike, and remanded for a jury trial on the truth of the prior conviction allegations, unless McCaw elected to admit the allegations or waive his right to a jury trial. We affirmed the judgment in all other respects.

On October 19, 2016, the Supreme Court granted the People's petition for review. On August 29, 2018, it transferred the matter to this court with directions to vacate our decision and reconsider the cause in light of *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*).

The parties have filed supplemental briefs after transfer from the Supreme Court. (Cal. Rules of Court, rules 8.528(f), 8.200(b).) McCaw urges us to reverse the trial court's findings and modify the judgment accordingly. The Attorney General argues that the sentencing court did not run afoul of the Sixth Amendment in finding that McCaw's New York attempted third degree robbery conviction constituted a strike and a serious felony under California law and that remand is not required to reconsider the prior conviction enhancement.

We hereby vacate our previous decision. Having reconsidered the cause in light of *Gallardo*, we vacate the trial court's determination that McCaw's New York conviction constitutes a strike and serious felony and remand the matter to the trial court to permit the People to either (1) demonstrate that McCaw's guilty plea in New York encompassed a relevant admission establishing that conviction qualifies as a prior strike and prior serious felony

conviction under California law, or (2) if the People opt not to make such a demonstration, for resentencing without reliance on the New York conviction. In all other respects, we affirm the judgment.

DISCUSSION

McCaw was convicted by jury in California in 2011 of attempted voluntary manslaughter (Pen. Code, §§ 192, 664).[1] The jury also found true allegations that McCaw used a deadly weapon (§ 12022, subd. (b)(1)) and inflicted great bodily injury (§ 12022.7, subd. (a)). Following a bench trial, the trial court found that McCaw's 1999 New York conviction for attempted third degree robbery was a strike under the three strikes law (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)) and a prior serious felony conviction (§ 667, subd. (a)).[2]

The trial court sentenced McCaw to 21 years in state prison. The sentence included, inter alia, a doubling of the term for attempted voluntary manslaughter due to the strike prior conviction, and a five-year enhancement for the serious felony.

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[1] Statutory references are to the Penal Code unless otherwise indicated.

[2] The trial court also found McCaw had served a prior prison term (§ 667.5, subd. (b)), which was unrelated to the New York conviction.

McCaw argued in his first appeal that the evidence was insufficient to support the trial court's initial findings that his 1999 New York conviction for third degree attempted robbery was a serious felony and a strike under California law. The Attorney General conceded the point, because robbery under California law requires that property be "taken from the other person or (his/her) immediate presence" (CALCRIM No. 1600), whereas under New York law it is not required that the person robbed be in equally close physical proximity to the stolen property. We held the evidence was insufficient to support the recidivism findings, reversed the findings, and remanded for a limited retrial of the prior conviction allegations.

The prosecution offered additional evidence at the second trial on the recidivism allegations. Among the items presented was a document signed by Michele Jaworski, which stated that on or about November 3, 1997, McCaw grabbed her purse and attempted to take it from her. The trial court found that the document containing Jaworski's statement appeared to be "in the form of a charging document" with the signed affidavit of the victim. The trial court again found the prior conviction allegations true.

In his second appeal to this court, McCaw again contended there was insufficient evidence that his New York attempted third degree robbery conviction qualified as a serious felony or a strike for purposes of the California sentencing enhancements. He argued that *Descamps*, *supra*, 570 U.S. 254, decided subsequent to our remand, prohibited

the trial court from examination of the entire record of conviction, repudiating our Supreme Court's decision in *People v. Guerrero* (1988) 44 Cal.3d 343, and its progeny. Alternatively, McCaw asserted that even under current California law, the evidence was insufficient to support the sentence enhancements. The Attorney General argued California's jurisprudence was unaffected by *Descamps*, and that the evidence was sufficient under California law. We agreed with McCaw that the evidence was insufficient. We explained that Jaworski's statement appeared to be the basis for reference of the case to the grand jury, which ultimately indicted McCaw for a variety of offenses including attempted first degree robbery, to which McCaw had pleaded not guilty. The case was resolved by guilty plea to attempted third degree robbery. Jaworski's statement was insufficient to demonstrate the basis for McCaw's New York conviction because it did not reliably reflect the facts of the offense to which McCaw pleaded guilty. We again reversed the recidivism findings, and remanded for a limited retrial of the prior conviction allegations. Because we were able to resolve the issue on the basis of the insufficiency of the evidence, we did not consider the impact of *Descamps's* Sixth Amendment analysis on our state's law.

At the third court trial on the recidivism allegations, the prosecution for the first time presented the transcripts of McCaw's change of plea and sentencing in the New York case. The New York indictment charged McCaw in the first two counts with attempted first degree robbery, and in the

third count with attempted second degree robbery. He was charged in the fourth and fifth counts with criminal possession of a weapon in the third degree. The discussion of the case settlement in the New York reporter's transcript indicated McCaw would plead guilty to attempted third degree robbery "[u]nder the third count" and possession of a weapon under the fifth count. The count in dispute in this appeal—the third count—was resolved with a plea to a lesser offense than the charged attempted second degree robbery. The plea colloquy in New York revealed the following:

"The Court: You're charged with an incident that occurred on November 3rd, 1997. It's alleged that on that date . . . you were engaged in criminal conduct. It's alleged you attempted to forcibly steal property from the person of Michele Jaworski, and furthermore in the course of the matter you did, and subsequent to that, you did possess a loaded firearm and that the firearm was possessed at a location not your home or place of business, that being an operable and loaded firearm.

"With respect to the allegation you forcibly stole property from another person armed with a loaded and operable firearm, do you now enter a plea of guilty?

"The Defendant: Yes.

"The Court: Do you hereby acknowledge the criminal acts alleged were, in fact, committed by you?

"The Defendant: Yes.

"The Court: Anybody forcing you to make the

admissions?

"The Defendant: No.

"The Court: Are you telling me the truth when you say you are guilty of these two crimes, attempted robbery in the third degree and criminal possession of a weapon in the third degree, and do you now freely acknowledge and admit your guilt of those offenses and tell me the truth in acknowledging your guilt?

"The Defendant: Yes."

Based on this language in the plea colloquy, the trial court for the third time found the recidivism allegations true. It explained that under the then-current case law, the only issue to resolve was whether McCaw had admitted to attempting to take property from the victim's person, and the plea colloquy demonstrated he had done so. The court again sentenced McCaw to 21 years in state prison.

McCaw timely appealed. He once more contended that the evidence was insufficient to support the finding that his 1999 conviction in New York for attempted third degree robbery was a prior serious felony conviction and a prior conviction under the three strikes law. He maintained the California Supreme Court's decision in *People v. McGee* (2006) 38 Cal.4th 682 (*McGee*), disapproved by *Gallardo*, *supra*, 4 Cal.5th at page 125, which permitted sentencing courts to review the record of the prior criminal proceeding to determine the nature of the prior conviction, was no longer viable following *Descamps*, in which the United States Supreme Court held that the Sixth Amendment

prohibits courts from examining evidence beyond the statutory elements of the crime in determining the nature of a prior conviction if the statute defining the crime is not divisible, leaving all factfinding to the jury. McCaw asserted attempted third degree robbery under New York law is not divisible—a point not challenged by the Attorney General. He argued that because the New York statute is indivisible, the court violated his Sixth Amendment rights by considering the plea colloquy to determine the nature of his prior conviction.

The Attorney General responded that McCaw's claim was without merit because this court was bound to follow *McGee*, *supra*, 38 Cal.4th 682, which was not superseded by *Descamps*.[3]

After discussing *Descamps* and *McGee* in detail, we held that the constitutional principles in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), and echoed in *Descamps*, that "[o]ther than the fact of a prior conviction,

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[3] The Attorney General argued that McCaw forfeited the issue on appeal by failing to object to admission of the plea colloquy on the basis that it violated his Sixth Amendment rights at the second retrial. We rejected the forfeiture contention, reasoning that McCaw's challenge to the sufficiency of the evidence, which was founded in a violation of the Sixth Amendment, was cognizable on appeal without objection to the evidence in the trial court. (See *People v. Trujillo* (2010) 181 Cal.App.4th 1344, 1350 fn. 3 ["[A]n argument that the evidence is insufficient to support a verdict is never waived"].)

any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," dictated the result. (*Apprendi*, *supra*, at p. 490.)

We explained that robbery in California contains an element not required under New York law—that property be taken from the person or immediate presence of the victim in New York, "[a] person is guilty of robbery in the third degree when he forcibly steals property." (N.Y. Penal Law § 160.05.) "A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime." (N.Y. Penal Law § 110.00.) There is "no requirement that the defendant take the property 'from the person or in the presence of another'" under the New York robbery statute. (Prac. Com. foll. N.Y. Pen. Law § 160.00; *People v. Smith* (1992) 79 N.Y.2d 309, 314.) Unlike the New York statute, section 211 defines robbery in California as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." The issue was whether the trial court's examination of the New York plea colloquy to determine if McCaw took property from the person or immediate presence of Jaworski—an element not required by the New York robbery statute—was permitted by the Sixth Amendment.

We held that the trial court's reliance on statements in the plea colloquy from McCaw's New York conviction that

were not relevant to the crime charged were the type of judicial factfinding prohibited by the Sixth Amendment as interpreted in *Descamps*. While the precise reach of the Sixth Amendment was not fully defined as to California law at that time, it was clear that when the elements of a prior conviction did not necessarily establish that it was a serious or violent felony under California law (and, thus, a strike), under the Sixth Amendment the court was not permitted to "'make a disputed' determination 'about what the defendant and state judge must have understood as the factual basis of the prior plea,' or what the jury in a prior trial must have accepted as the theory of the crime." (*Descamps*, *supra*, 570 U.S. at p. 269.)

We concluded that the trial court's reliance on legally superfluous statements in the plea colloquy to supply the missing element that McCaw took property from the person of Jaworski ran afoul of several portions of the *Descamps* analysis. First, *Descamps* disapproved of a court trying "to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct. [Citation.] . . . The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances." (*Descamps*, *supra*, 520 U.S. at pp. 269–270.) The trial court plainly went beyond the statutory elements of the New York offense to determine

McCaw's underlying conduct.

Second, "when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment." (*Descamps*, *supra*, 520 U.S.at p. 270.) McCaw's plea was to attempted third degree robbery; assuming he acquiesced to other facts beyond that offense, those facts were superfluous under the Sixth Amendment. McCaw never waived his right to have a jury determine facts beyond the elements of attempted third degree robbery.

Third, the Supreme Court cautioned that statements of fact in a plea colloquy "may be downright wrong. A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense—and may have good reason not to. . . . [D]uring plea hearings, the defendant may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations." (*Descamps*, *supra*, 520 U.S. at p. 270.) What occurred during the plea colloquy in the New York court demonstrated the danger the *Descamps* court envisioned.

The plea transcript reflected that the New York court initially misstated the language of the third count of the indictment[4] in taking McCaw's plea. The third count alleged

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[4] The New York indictment stated in full in the third count as follows: "The Grand jury of the county of the Bronx by this indictment, accuses the defendant Michael McCaw of

that McCaw "did attempt to forcibly steal property, that being personal property, from Michele Jaworski . . . ." The New York court subtly restated the allegation, advising McCaw that "[i]t's alleged you attempted to forcibly steal property from the person of Michele Jaworski . . . ." The subtle change was that the indictment alleged in the statutory language that McCaw *attempted to forcibly steal personal property*, but the court advised McCaw that the allegation was that he *attempted to forcibly steal property from the person*, which is akin to the language in California's robbery statute. This illustrated the problem anticipated by *Descamps* with consideration of a plea colloquy as to facts beyond the statutory elements of the offense: the court's initial description of the charge was "downright wrong." (*Descamps*, *supra*, 520 U.S.at p. 270.) In the next paragraph, in taking the guilty plea, the New York court misstated the allegation in the New York statute and the indictment: "With respect to the allegation you forcibly stole property from another person armed with a loaded and

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the crime of attempted robbery in the second degree admitted as follows: [¶] The defendant, Michael McCaw, on or about November 3, 1997, in the county of the Bronx, did attempt to forcibly steal property, that being personal property, from Michele Jaworski, and in the course of commission of the crime or in immediate flight therefrom, the defendant displayed what appeared to be a revolver."

operable firearm, do you now enter a plea of guilty?"[5] McCaw answered "Yes" to the court's question, admitting that he forcibly stole property, without admitting the property was taken from the person or immediate presence of Jaworski. McCaw's answer to the New York court's question did not admit conduct satisfying the California robbery statute.

The Attorney General disputed this interpretation of the plea, but we concluded that even if she was correct that McCaw admitted taking property from the person of Jaworski, in the end her argument would fail, because the United States Supreme Court's decision in *Shepard v. United States* (2005) 544 U.S. 13, did not permit this type of judicial factfinding based upon a plea. *Shepard*, as explained in *Descamps*, permits a court to consider a plea colloquy in determining whether a prior conviction has been shown by the prosecution, but only to the extent the plea agreement *proves the statutory elements of the alleged prior offense*. "[A]s *Shepard* indicated, when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing

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[5] The New York Court incorrectly stated, and defendant acquiesced, that it was alleged defendant *forcibly stole* property, not that it was alleged defendant *attempted to forcibly steal* property, which further highlights the difficulties involved with parsing the language of the plea colloquy to determine whether a defendant pleaded guilty to the elements of the relevant offense.

court to impose extra punishment." (*Descamps*, *supra*, 520 U.S.at p. 270.) McCaw agreed to a guilty plea to a lesser offense than that charged in the third count, an offense which did not include all the elements of attempted robbery in California. To sanction consideration of facts not elements of the New York offense "would allow [the] sentencing court to rewrite the parties' bargain." (*Id.* at p. 271.) We held that this was not permitted by the Sixth Amendment.

We therefore reversed the recidivism findings and remanded for a jury trial on the allegations, unless McCaw elected to waive his right to a jury trial and either admit the allegations or submit to judicial factfinding. (See *Shepard*, *supra*, 544 U.S. at p. 26, fn. 5 [defendant "can waive the right to have a jury decide questions about his prior convictions"].)

After our opinion was filed on July 12, 2016, the Supreme Court granted the People's petition for review and deferred consideration of the matter pending disposition in *Gallardo*. *Gallardo* overruled *McGee*, *supra*, 38 Cal.4th 682, and held: "'The Sixth Amendment contemplates that a jury—not a sentencing court—will find' the facts giving rise to a conviction, when those facts lead to the imposition of additional punishment under a recidivist sentencing scheme. (*Descamps*, *supra*, 570 U.S. at [pp. 269–270].) This means that a sentencing court may identify those facts it is 'sure the jury . . . found' in rendering its guilty verdict, or those facts as to which the defendant waived the right of jury trial

in entering a guilty plea. (*Ibid*.) But it may not 'rely on its own finding' about the defendant's underlying conduct 'to increase a defendant's maximum sentence.' (*Id*. at p. [270].)" (*Gallardo*, *supra*, 4 Cal.5th at p. 134.) The *Gallardo* court further clarified, "The court's role is . . . limited to identifying those facts that were established by virtue of the conviction itself—that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea." (*Id*. at p. 136, fn. omitted.) Finally, *Gallardo* held that "the appropriate course is to remand to permit the trial court to make the relevant determinations about what facts defendant admitted in entering [his] plea. Our precedent instructs that determinations about the nature of prior convictions are to be made by the court . . . ." (*Id*. at p. 138.)

Reconsidering our opinion in light of *Gallardo*, we reach the conclusion that the trial court's prior conviction findings must be vacated as dictated in *Gallardo* for the reasons stated in our prior opinion, and remand the matter to the trial court for further proceedings consistent with *Gallardo*.[6]

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[6] McCaw requests that in the interests of efficiency, we modify the sentence rather than remanding the matter to the trial court. However, the trial court has not had the opportunity to rule on the question of whether McCaw's New York attempted third degree robbery conviction qualifies as a strike employing the analysis set forth in *Gallardo*. We therefore remand to the trial court to decide the issue in

DISPOSITION

The trial court's determination that McCaw's New York conviction for attempted third degree robbery constitutes a prior serious felony conviction and a strike is vacated. The matter is remanded to the trial court to permit the People to demonstrate, based on the record of the New York plea proceedings, that McCaw's New York guilty plea encompassed a relevant admission establishing that the third degree robbery conviction qualifies as a serious or violent prior felony conviction within the meaning of section 667, subdivision (a), and sections 667, subdivisions (b)–(i) and 1170.12, subdivisions (a)–(d). If the People opt not to make such a demonstration, the trial court shall resentence McCaw without any reliance on the vacated prior New York felony conviction finding. In all other respects, the judgment is affirmed.

MOOR, J.

We concur:

BAKER, Acting P.J. JASKOL, J.*

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light of *Gallardo's* holding in the first instance, should such determination be appropriate.

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