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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMUEL LAGUNAS,

Defendant and Appellant.

B280937

(Los Angeles County
Super. Ct. No. TA140761)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Remanded for resentencing.

James Koester, 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, Victoria B. Wilson, Theresa A. Patterson and David Williams, Deputy Attorneys General, for Plaintiff and Respondent.

Samuel Lagunas was convicted after a jury trial of attempted willful, deliberate and premeditated murder (Pen. Code, §§ 187, subd. (a), 664, subd. (a))¹ with special findings by the jury that he had personally discharged a firearm causing great bodily injury to the victim (§ 12022.53, subd. (d)) and by the court in a bifurcated proceeding that he had suffered a prior serious felony conviction within the meaning of section 667, subdivision (a), and the three strikes law (§§ 667, subds. (b)-(i), 1170.12). He was sentenced as a second strike offender to an aggregate state prison term of 39 years to life.

On appeal Lagunas contends his juvenile adjudication for robbery should not have been used as a prior strike conviction because the People failed to prove he was at least 16 years old at the time he committed the offense, as required by sections 667, subdivision (d)(3)(A), and 1170.12, subdivision (b)(3)(A). He also contends the juvenile adjudication cannot be used to enhance his sentence because a jury did not determine the facts underlying the adjudicated offense, although he concedes the Supreme Court rejected this argument in *People v. Nguyen* (2009) 46 Cal.4th 1007. Finally, in a supplemental brief Lagunas contends, and the Attorney General agrees, the case should be remanded to provide the trial court an opportunity to exercise its discretion with respect to imposition of the firearm enhancement under newly enacted section 12022.53, subdivision (h).

We affirm the judgment of conviction and remand the matter for the limited purpose of allowing the trial court to

¹ Statutory references are to this code unless otherwise stated.

conduct a new sentencing hearing to determine whether to strike the firearm enhancement.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Attempted Murder of Javier Vuelvas

At trial the People presented testimony from the shooting victim, Javier Vuelvas; Vuelvas's girlfriend, Vanessa Delgado; Lagunas's girlfriend, Janet Gonzalez; Delgado's sister; the responding Los Angeles County deputy sheriff who spoke to Delgado and Gonzalez following the incident; and the sheriff's detective who also interviewed Delgado and Gonzalez. Lagunas did not testify or present any witnesses in his defense.

The evidence established that Lagunas is a member of the Compton Varrio 155 gang. Vuelvas is a member of the East Side Longo gang. Gonzalez and Delgado are cousins.

On September 28, 2015 the two cousins argued just outside Delgado's home, which is in Compton Varrio 155's territory. Lagunas and Vuelvas were both present. When Gonzalez went to her car to check on her children, Lagunas continued the argument with Delgado and involved Vuelvas in the dispute. Lagunas told Vuelvas he did not want to see him in the neighborhood, took out a black handgun and shot Vuelvas three times. Vuelvas was hospitalized for approximately one month, but survived the injuries.

2. Lagunas's Prior Juvenile Adjudication for Robbery

The information alleged Lagunas had suffered a prior conviction for robbery on July 11, 2012 in Los Angeles Superior Court case No. TJ6403, which qualified as a strike under the three strikes law and as a serious felony under section 667,

subdivision (a).² To prove this allegation at the bifurcated bench trial following the jury's verdict, the People introduced a seven-page document, marked exhibit 31, which the prosecutor described as being "from the Division of Juvenile Justice; it's a certified priors packet." The parties stipulated Lagunas was the person referred to in the exhibit.

Following a cover letter from the custodian of records, the exhibit contained the three-page form JV-732, adopted for mandatory use by the Judicial Council of California, entitled Commitment to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice. This document states that a juvenile court hearing had been held in the case on July 11, 2012 before a superior court commissioner, that Lagunas was born on July 5, 1994 and was under the age of 18 at the time of the commission of the commitment offense and that he had been declared a ward of the court and was being committed to the Division of Juvenile Justice based on multiple sustained delinquency petitions: a petition sustained on December 15, 2011 for a violation of section 211 (robbery); a sustained petition on January 21, 2011 for a violation of section 12031, subdivision (a)(1) (possession of a firearm by a felon); a sustained petition on January 21, 2011 for a violation of section 12101, subdivision (a)(1) (possession of a firearm by a minor); a sustained petition on December 10, 2009 for a violation of section 422 (making a criminal threat); and a sustained petition

² The information originally identified the case number as TJ164031 and the conviction date as March 1, 2012. The information was subsequently amended without objection to conform to proof.

on July 9, 2008 for a violation of Vehicle Code section 10851, subdivision (a) (unlawful taking or driving a vehicle).

The sixth page of exhibit 31 is a Division of Juvenile Justice form, labeled Jurisdiction/Authorized Confinement Record. The document, which appears to have been prepared on November 18, 2013, lists multiple offenses, beginning with the robbery adjudication, and records “TJ6403” as the “court number,” July 11, 2012 as the date of court action, and December 14, 2011 as the date of offense. The following page, dated October 13, 2016, certifies that the document is a correct copy of a document on file in the Division of Juvenile Justice. The final page of the exhibit, also certified as a correct copy of an original on file at the Division of Juvenile Justice, is an untitled printout of Lagunas’s “referral history.” It lists five offenses, starting with the robbery adjudication, and identifies a court date of July 11, 2012 and an offense date of December 14, 2011.

After reviewing exhibit 31 the court found the People had proved beyond a reasonable doubt that Lagunas had a sustained juvenile petition for violating section 211 and stated it “recognizes the defendant’s date of birth in con[nection with] the offense date.” The court thus found the special allegations to be true. Belatedly recognizing it had not given defense counsel an opportunity to address the matter, the court said, “I didn’t even ask, did you want to be heard on any of the documents?” Defense counsel responded, “No.” The court replied, “Okay. Thank you, sir. The court’s ruling stands.”

At the sentencing hearing the following month the court sentenced Lagunas to an aggregate state prison term of 39 years to life, doubling the life term for attempted premeditated murder

to 14 years to life and adding a consecutive term of 25 years to life for the firearm use enhancement.³

DISCUSSION

1. *Lagunas Was Properly Sentenced as a Second Strike Offender*

Section 667, subdivision (d)(3), part of the three strikes law, provides, “A prior juvenile adjudication shall constitute a prior serious and/or violent felony conviction for purposes of sentence enhancement if: [¶] (A) The juvenile was 16 years of age or older at the time he or she committed the prior offense. [¶] (B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code [¶] (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law. [¶] (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.” Section 1170.12, subdivision (b)(3), is substantively identical (with only very minor wording differences).

The People must prove all elements of an alleged sentence enhancement beyond a reasonable doubt. (*People v. Miles* (2008) 43 Cal.4th 1074, 1082; *People v. Tenner* (1993) 6 Cal.4th 559,

³ Although the court found true the section 667, subdivision (a), special allegation, at sentencing the court and the parties agreed Lagunas’s juvenile adjudication cannot be considered a prior serious felony conviction within the meaning of that provision. (See *People v. Smith* (2003) 110 Cal.App.4th 1072, 1080, fn. 10; *People v. West* (1984) 154 Cal.App.3d 100, 107-108; see also *People v. Park* (2013) 56 Cal.4th 782, 798.)

566.)⁴ Robbery is an offense listed in Welfare and Institutions Code section 707, subdivision (b)(3). It is undisputed that Lagunas was found fit to be dealt with under juvenile court law and, thereafter, was adjudged a ward of the juvenile court pursuant to Welfare and Institutions Code section 602 for committing robbery. However, Lagunas contends his prior juvenile adjudication was not properly considered a strike prior because the People failed to present competent evidence he was at least 16 years old when he committed that offense and a jury did not determine the facts underlying the adjudicated offense. Lagunas's arguments fail.

- a. *The trial court properly considered the entirety of exhibit 31 in determining Lagunas had suffered a qualifying prior strike adjudication*

Lagunas acknowledges all of exhibit 31 was "foundationally admissible" as the contents of a section 969b packet.⁵ Indeed,

⁴ When reviewing whether the People have proved a sentence enhancement, "we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt." (*People v. Miles, supra*, 43 Cal.4th at p. 1083.)

⁵ Section 969b permits proof of a prior conviction by introducing evidence of a certified copy of a prison record. (See *People v. Ruiz* (1999) 69 Cal.App.4th 1085, 1090 ["[p]rison records certified under section 969b are also admissible to prove that the defendant was convicted of a particular offense"]; *People v. Matthews* (1991) 229 Cal.App.3d 930, 937, fn. 5 ["section 969b is a recognized statutory exception to the hearsay rule"].)

Lagunas concedes, because his defense counsel did not object to the admissibility of any of the documents in exhibit 31, any argument relating to admissibility has been forfeited. (Evid. Code, § 353; see *People v. Holt* (1997) 15 Cal.4th 619, 666-667.) Nonetheless, relying on *People v. Guerrero* (1988) 44 Cal.3d 343 (*Guerrero*) and *People v. Woodell* (1998) 17 Cal.4th 448 (*Woodell*), Lagunas contends that the court was limited to considering the “record of conviction” to determine if the People had proved he had suffered a qualifying prior strike adjudication. He argues that within exhibit 31 only the form JV-732 was part of the record of conviction and thus the only document competent to prove the sentence enhancement because the remaining documents, although certified by the Division of Juvenile Justice, and thus admissible under section 969b, were not prepared contemporaneously with the adjudication or commitment of Lagunas following the July 11, 2012 disposition hearing.⁶

⁶ Lagunas supports his contention that certified institutional records properly part of a section 969b packet but prepared after his July 2012 disposition hearing and commitment to the Division of Juvenile Justice are not part of the record of conviction to which the court could look to determine whether his robbery adjudication qualified as a prior strike conviction by pointing to language in *Woodell, supra*, 17 Cal.4th at page 454. At that point in its opinion, however, the Supreme Court stated it had “never defined exactly what comprises the record of conviction”; noted that in an earlier case it had referred to the “record of the proceedings leading to imposition of judgment on the prior conviction”; and explained that, from these cases, one Court of Appeal decision—not the Court itself—had concluded that “documents prepared *after* conviction and sentencing are not part of the “record of conviction.” A document prepared after judgment, by definition, is not part of the record “*leading* to

Because the form JV-732 does not identify the date of the robbery that formed the basis for the juvenile petition sustained on December 15, 2011, Lagunas continues, the People failed to prove by competent evidence all necessary elements of the prior strike allegation. Lagunas's argument misapprehends the scope of *Guerrero* and *Woodell* and ignores the holding and analysis of *People v. Martinez* (2000) 22 Cal.4th 106 (*Martinez*).

In *Guerrero, supra*, 44 Cal.3d 343, where the question was whether a prior burglary conviction was for burglary of a residence and, therefore, a "serious felony" and a strike (§§ 1170.12, subd. (b)(1), 1192.7, subd. (c)(18)), the Supreme Court held a trial court may look beyond the judgment to the entire record of conviction, but not further, in determining the truth of the prior conviction allegation. (*Guerrero*, at p. 356.) That limitation "effectively bars the prosecution from relitigating the circumstances of a crime committed years ago and thereby threatening the defendant with harm akin to double jeopardy and denial of speedy trial." (*Guerrero*, at p. 355.) In *Woodell, supra*, 17 Cal.4th at pages 450-451 the Court reaffirmed its *Guerrero* holding in the context of an out-of-state conviction: "In

imposition of judgment.'"" (*Ibid.*, quoting *People v. Lewis* (1996) 44 Cal.App.4th 845, 852.) The *Woodell* Court did not endorse that conclusion and, to the contrary, rejected it to the extent it was the basis for the defendant's argument that an appellate opinion, prepared after conviction and sentencing, was not part of the record of conviction. (See *id.* at p. 451.) We need not address this aspect of Lagunas's argument to decide the issues now before us. (Cf. *People v. Martinez* (2000) 22 Cal.4th 106, 116 ["section 969b is essentially 'a hearsay exception' that allows certified copies of the specified records 'to be used for the truth of the matter asserted in those records'"].)

determining whether an out-of-state conviction qualifies as a prior serious felony conviction under California law, the trier of fact may look to the entire record of conviction, but no further.” The Court added, “[T]he record of conviction is not limited to the *trial* court record but extends to the *appellate* court record, including the appellate opinion.” (*Id.* at p. 451.)

In *Martinez*, *supra*, 22 Cal.4th 106, however, the Supreme Court explained that *Guerrero* had considered only “the permissible scope of proof to establish the *substance* of a prior conviction, i.e., the nature and circumstances of the underlying conduct.” (*Martinez*, at p. 117.) It did not address “matters of proof relating to other aspects of a prior conviction, such as the identity of the defendant or service of a prior prison term. . . . [*Guerrero*’s] limitations apply only to proof of ‘the circumstances of the prior crime.’” (*Id.* at pp. 117-118.) The Court then held the justifications for the limitations on proof imposed by *Guerrero*—preventing relitigation of the circumstances of a crime committed years before, raising double jeopardy and speedy trial issues—did not apply to the case before it, which involved the identity of the defendant, not the circumstances of the crime: “Permitting the prosecution to introduce evidence other than the record of conviction or certified prison records under section 969b to show the identity of the person who served prison terms for prior convictions does not implicate these concerns.” (*Id.* at p. 118.)

The *Martinez* Court’s limitation on *Guerrero*’s holding that only the record of conviction may be considered in determining the truth of a prior conviction allegation was reinforced by the Supreme Court’s recent decision in *People v. Gallardo* (2017) 4 Cal.5th 120. *Gallardo* disapproved *People v. McGee* (2006) 38 Cal.4th 682, which had held the Sixth Amendment permits

courts not only to review the record of a defendant's prior conviction to determine whether the crime qualifies as a serious felony for purposes of the sentencing laws but also to decide based on that record what conduct likely supported the defendant's conviction. Guided by the analysis in several United States Supreme Court cases involving federal statutes, *Gallardo* held, "a court considering whether to impose an increased sentence based on a prior qualifying conviction may not determine the 'nature or basis' of the prior conviction based on its independent conclusions about what facts or conduct 'realistically' supported the conviction." (*Gallardo*, at p. 136; see also *id.* at p. 134 [the trial court may not rely on its own finding about the defendant's underlying conduct to increase the maximum sentence].)

As the Attorney General argues, neither Lagunas's date of birth (as to which there is no dispute) nor the date of commission of the robbery is part of the substance of his prior robbery adjudication—"the nature and circumstances of the underlying conduct," in the language of the Supreme Court in *Martinez*, *supra*, 22 Cal.4th at page 117, or the "nature or basis" of the underlying conduct that led the prior conviction, as phrased in *People v. Gallardo*, *supra*, 4 Cal.5th at page 136. Proving those dates, like proving the defendant's identity, does not involve relitigating the circumstances of a crime committed many years ago or implicate double jeopardy or speedy trial concerns. Accordingly, the trial court here properly looked to the entirety of exhibit 31 to determine Laguna was at least 16 years old at the time of the robbery. (See also *People v. Dunlap* (1993) 18 Cal.App.4th 1468, 1476 [record-of-conviction limitation in

Guerrero only applies “where the question is the *substance* of the prior conviction (i.e., the nature of the conduct giving rise to it”).)

- b. *Substantial evidence supports the finding Lagunas’s juvenile adjudication for robbery qualifies as a strike prior*

In his reply brief Lagunas contends, even if all of exhibit 31 was properly considered by the trial court, no rational trier of fact could have concluded from those documents that the prosecution carried its burden of proving beyond a reasonable doubt that he was 16 years old at the time of the robbery. Even if not forfeited because not raised in his opening brief (see *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 408), Lagunas’s substantial evidence argument lacks merit.

As Lagunas admits, two of the documents within exhibit 31—the Jurisdiction/Authorized Confinement Record and the untitled printout of Lagunas’s referral history—identify an offense date of December 14, 2011. Lagunas was 17 years old on that date, which was the basis for the trial court’s finding that Lagunas had suffered a juvenile adjudication qualifying as a strike. Because those two documents identify a total of seven offenses committed by Lagunas and adjudicated by the juvenile court, however, Lagunas argues there is no way to tell whether robbery or one of the other crimes was committed on December 14, 2011.

Lagunas’s argument ignores the sustained petition dates for all seven offenses provided by the form JV-732 and the page immediately following it in exhibit 31. Six of the petitions were sustained prior to December 14, 2011. Only the robbery allegation was sustained after December 14, 2011; only that petition could have concerned an offense that occurred on

December 14, 2011. The trial court was fully justified in concluding the People had proved the prior strike allegation beyond a reasonable doubt. (See *People v. Delgado* (2008) 43 Cal.4th 1059, 1066 [trial court is entitled to draw reasonable inferences from the records offered to prove defendant had suffered a prior serious felony conviction]; *People v. Learnard* (2016) 4 Cal.App.5th 1117, 1123 [same].)

c. *A juvenile adjudication may be used as a strike even though there was no right to a jury trial in the juvenile proceedings*

Citing the Ninth Circuit Court of Appeals' decision in *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187, Lagunas argues the use of a juvenile adjudication as a prior strike conviction violated his Sixth and Fourteenth Amendment right to have a jury determine any fact that increases his sentence above the statutory maximum under the principles articulated in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]. Lagunas acknowledges not only that *Apprendi* specifically excluded prior convictions from those facts that must be submitted to a jury but also that the California Supreme Court expressly rejected this precise argument in *People v. Nguyen, supra*, 46 Cal.4th 1007. Accordingly, we must reject it as well. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)⁷

⁷ In fact, six years before the Supreme Court's decision in *Nguyen*, this court in *People v. Smith, supra*, 110 Cal.App.4th 1072 had already rejected a constitutional argument identical to the one now advanced by Lagunas. (See *People v. Nguyen, supra*, 46 Cal.4th at p. 1020 [citing *Smith* as one of the "overwhelming

2. Lagunas Is Entitled to a New Sentencing Hearing

Lagunas's sentence included a 25-year-to-life enhancement pursuant to section 12022.53, subdivision (d), for personally discharging a firearm causing great bodily injury during the commission of the attempted murder.⁸ When Lagunas was sentenced, former section 12022.53, subdivision (h), prohibited the trial court from striking the finding bringing Lagunas within the provisions of section 12022.53. (Stats. 2010, ch. 711, § 5.)⁹ Effective January 1, 2018 section 12022.53, subdivision (h), was amended to give the trial court discretion to strike a firearm enhancement otherwise required to be imposed by section 12022.53. (See Stats. 2017, ch. 682, § 2.)¹⁰

Lagunas and the Attorney General agree that Lagunas, whose sentence was not final before amended section 12022.53,

majority of courts to reject the contention defendant makes in this case”].)

⁸ Although the information alleged sentencing enhancements under section 12022.53, subdivisions (b), (c) and (d), apparently only the subdivision (d) allegation was submitted to the jury. No findings were made on the subdivisions (b) and (c) allegations.

⁹ Former section 12022.53, subdivision (h), provided, “Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section.”

¹⁰ As amended, section 12022.53, subdivision (h), now provides, “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.”

subdivision (h)'s effective date, is entitled to a new sentencing hearing to give the trial court an opportunity to exercise its discretion to strike the section 12022.53, subdivision (d), firearm enhancement imposed at the original sentencing hearing. (See *People v. Francis* (1969) 71 Cal.2d 66, 75-76 [Legislature is presumed to intend amendments to Penal Code that give trial court discretion to impose a lower sentence to apply retroactively to all nonfinal judgments]; *In re Estrada* (1965) 63 Cal.2d 740, 745 ["When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply."]; see also *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 307-309 [Proposition 57, "an 'ameliorative change[] to the criminal law'" that reduced the possible punishment for juveniles, applies retroactively to juvenile defendants whose judgments are not yet final].)

Absent any indication in the record that a remand in this instance would be futile, we also agree Lagunas is entitled to a new sentencing hearing to permit the trial court to exercise its newly granted discretion. (See *People v. Chavez* (2018) 21 Cal.App.5th 971, 1015; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.)

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated, and the matter remanded for the limited purpose of allowing the trial court to conduct a new sentencing hearing under section 12022.53, subdivision (h), to determine whether to exercise its discretion to strike the firearm enhancement.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.