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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFRED F. PITTMAN,

Defendant and Appellant.

A132074

(San Francisco County
Super. Ct. No. 10035302)

After a jury trial, defendant Alfred F. Pittman was convicted of battery causing injury on a peace officer (Pen. Code, § 243, subd. (c)(2)¹) (count one), battery causing serious bodily injury (§ 243, subd. (d)) (count two), and assault on a peace officer with force likely to cause great bodily injury (§ 245, subd. (c))(count three). The jury also found true that as to counts one and three, defendant personally inflicted great bodily injury on the officer. (§ 12022.7, subd. (a).) After a bifurcated trial, the jury found true that defendant had three prior felony convictions that qualified as strikes (§§ 667, subds. (d), (e), 1170.12, subds. (b), (c)), serious felonies (§ 667, subd. (a)), and for which he had served separate prison terms (§ 667.5, subd. (b)). At sentencing, the trial court struck two of the strike convictions, stayed sentence on counts one and two, and sentenced defendant to an aggregate term of 23 years in state prison on count three.

On appeal defendant argues the jury improperly found that he had suffered three prior felony convictions. He also challenges the imposition of a restitution fine in the sum of \$25,800, and the related parole revocation fine in the same amount, and the imposition

¹ All further unspecified statutory references are to the Penal Code.

of two separate five-year terms for his prior convictions (§ 667, subd. (a)) for each of the three current convictions. We conclude there is no reason to set aside the jury's findings that defendant suffered three prior felony convictions. However, we remand the matter for resentencing for a redetermination of the restitution fine and the related parole revocation fine, and to vacate the imposition of the five-year terms for his prior convictions (§ 667, subd. (a)) that were imposed on counts one and two for which sentences were stayed.

FACTUAL AND PROCEDURAL BACKGROUND

On November 28, 2010, defendant, who was aggressively begging for money, got into an verbal altercation with an off-duty police officer. During the argument, when the officer put her hand up towards defendant to detain him, defendant punched the officer twice in the face, causing the officer to fall to the ground. The officer suffered a large lump on her head, swelling on the right jaw, and pain in her left shoulder. A jury found defendant guilty of battery causing injury on a peace officer (§ 243, subd. (c)(2)) (count one), battery causing serious bodily injury (§ 243, subd. (d)) (count two), and assault on a peace officer with force likely to cause great bodily injury (§ 245, subd. (c))(count three).² As to counts one and three, the jury found true an enhancement allegation that defendant personally inflicted great bodily injury on the officer. (§ 12022.7, subd. (a).) After a bifurcated trial, the jury found true sentencing enhancement allegations that defendant had three prior felony convictions that qualified as strikes (§§ 667, subds. (d), (e), 1170.12, subds. (b), (c)), serious felonies (§ 667, subd. (a)), and for which he had served separate prison terms (§ 667.5, subd. (b)).

DISCUSSION

I. Jury's Verdict on Prior Convictions

A. Relevant Facts

After the jury convicted defendant of the substantive charges, it was asked to consider whether defendant had suffered two prior 1983 felony convictions for rape (§ 261, subd. (a)(2)), and one prior 1990 felony conviction for an assault with a firearm

² The jury did not reach a verdict on a fourth count, charging defendant with the lesser included offense of assault with force likely to cause great bodily injury, and that count was later dismissed at the request of the prosecution.

(§ 245, subd. (a)(2)). The prosecution’s case consisted solely of submitting for the jury’s consideration the certified Department of Corrections section 969(b) prison package to establish each of defendant’s three prior convictions.

Without objection, the court instructed the jury that the People were required to prove the allegations relating to the prior convictions beyond a reasonable doubt, and unless the evidence proved an allegation beyond a reasonable doubt, the jury had to find the allegation not proven. The jurors were also instructed that they might “not return a finding that any alleged conviction has or has not been proved unless all 12 of you agree on that finding.” Instead of giving the jury a separate verdict form for each conviction, the court provided the jury with three verdict forms that addressed the three classes of prior conviction allegations.³ The court told the jury: “And what we have done with these allegations, we have prepared separate verdict forms because they’re alleged—some of them are duplicates, I guess all of them are duplicates in terms of the crimes. But they are alleged under different sections of the Penal Code for different convictions, so you have a special verdict for each type of conviction. And the jury has to make a finding, and the language is all contained in the verdict. Put it this way, you need one for each type of these prior convictions, so they’re all laid out.” The jury returned their verdict after marking “True” as to the allegation asserted on each verdict form.

³ Without objection, the three verdict forms read as follows:

The jury finds the allegation under Penal Code sections 667(d), 667(e), 1170.12(b), and 1170.12(c), the defendant Alfred Pittman suffered a conviction for the crimes of:

[List of three prior crimes] [¶] to be ____ [¶] (True or Not True)

The jury finds the allegation under Penal Code section 667(a)(1), the defendant Alfred Pittman was previously convicted of a serious felony: [List of three prior crimes] [¶] to be _____[¶] (True or Not True)

The jury finds the allegation under Penal Code section 667.5(b), the defendant Alfred Pittman did serve a separate term in state prison and that he did not remain free of prison custody for, and/or commit an offense resulting in a felony conviction during a period of five years subsequent to the conclusion of said term: [List of three prior crimes] [¶] to be _____[¶] (True or Not True)

Before accepting the verdict, the court stated: “I want the record to be clear, something just occurred to me. I’m going to ask all the jurors, just so we’re clear and so we have record, we just group the convictions as I mentioned by type. But when you sign, I’m going to be asking you this—if this is not what happened, I want you to advise me by raising your hand—when the jury returned verdicts of true on those convictions, does that indicate to every conviction and every type of conviction, for each one, the jury was unanimous that the finding was true? The foreperson replied: “Yes.” The court again stated: “Just so it’s clear, some people didn’t think one was clear, and there were two that weren’t true, or some people thought two were true and one wasn’t true. I’m making sure we have a clear record. I’m asking the jury if that is what happened. Let me know, so then we will have to clarify. [¶] The foreperson said the finding of true as to each of those groups meant every juror found individually each alleged prior unanimously to be true. [¶] Is that what happened, Mr. XXXXX? The foreman again replied: “Yes.” At the request of defense counsel, the jury was polled by the clerk, who asked the jurors to respond “yes” or “no” as to whether this was their true and correct verdict “[a]s to the allegation pursuant to [§§] 667(d), 667(e), 1170.12(b), and 1170.12(c),” “[a]s to the allegation pursuant to [§] 667(a)(1),” and “[a]s to the allegation pursuant to [§] 667.5(b).” Each juror responded “Yes,” to the clerk’s questions. The court then stated: “It’s unanimous. Record the verdict.”

B. Analysis

Defendant contends the jury’s verdict on his prior convictions should be reversed because the verdict forms did not ask the jury to make a separate finding as to each prior conviction. However, even assuming the issue was properly before us, we see no error in the verdict forms that would require a new trial. Section 1158 reads, in pertinent part, that “[i]f more than one previous conviction is charged a separate finding must be made as to each.” As noted by the Attorney General, any defect in the verdict forms inured to the benefit of defendant. Consistent with the instructions and the verdict forms, the jurors were in substance instructed that before finding any allegation true they had to find beyond a reasonable doubt that defendant had suffered all three prior convictions. Thus, we reject

defendant's arguments that the format of the verdict forms—asking the jury to find all three prior convictions collectively true beyond a reasonable doubt—either lowered the standard of proof because the jury did not have to make a separate finding as to each prior conviction, or constituted structural error requiring reversal without any showing of prejudice.

While the verdict forms did not require the jury to make a separate finding as to each prior conviction, any irregularity in the jury's verdict was not prejudicial under any standard of review. The prosecutor admitted into evidence certified documents showing that defendant was convicted in 1983 of two rapes and convicted in 1990 of an assault with a firearm. Defendant presented no evidence to the contrary and points to nothing in the record that leads us to believe a jury would reach a different verdict if the matter were remanded for a retrial on defendant's three prior convictions.

II. Restitution Fine

Section 1202.4, subdivision (b), requires that “[i]n every case where a person is convicted of a crime,” the trial court shall impose a restitution fine “unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.” “The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense.” (*Ibid.*) The restitution fine for a felony committed on November 28, 2010, was required to be set in an amount of “at least \$200 and no more than \$10,000.” (*Id.*, former subd. (b)(1).)⁴ In setting a felony restitution fine, the court “*may* determine the amount of the fine as the product of the minimum fine . . . multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted.” (*Id.* at subd. (b)(2), italics added.) Where the court sets the fine “in excess of” the minimum fine, “the court

⁴ For felony offenses committed after December 31, 2011, the Legislature has increased the minimum restitution fine: Starting on January 1, 2012, the minimum restitution fine shall not be less than \$240. (Stats. 2011, ch. 358, § 1, amending §1202.4(b)(1); see, also, *People v. Palomar* (1985) 171 Cal.App.3d 131, 136 [restitution fine not to be applied retroactively to offenses occurring before the effective date of the enactment of the statute imposing the fine].)

shall consider any relevant factors including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, . . . and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime. . . . Express findings by the court as to the factors bearing on the amount of the fine shall not be required." (*Id.*, subd. (d).)

The parties agree, and we concur, that the trial court erred by calculating the amount of the restitution fine in the sum of \$25,800, which exceeded the \$10,000 maximum (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534), was based in part on the two felony convictions for which sentences had been stayed pursuant to section 654 (*People v. Le* (2006) 136 Cal.App.4th 925, 934), and included a mathematical error. The correction of the mathematical error and the omission of two felony convictions in calculating the amount of the restitution fine under the section 1202.4, subdivision (b)(2) formula, would result in a restitution fine of \$4,600 (the product of \$200 multiplied by defendant's sentence of 23 years, multiplied by one felony conviction). Although the parties ask us to reduce the restitution fine to \$4,600, we decline to do so. The reduced amount would be within the court's broad discretionary right to impose a fine between \$200 and \$10,000, for the assault on a peace officer with force likely to cause great bodily injury conviction. However, the only basis for the court's decision reflected in the record is reliance on the discretionary formula. Therefore, we do not know whether the court would have imposed a restitution fine of \$4,600 on that conviction alone had the court been aware that use of the felony convictions for which sentences had been stayed was barred by section 654. Consequently, we conclude the matter should be remanded to allow the court to reconsider an appropriate restitution fine for the conviction for an assault on a peace officer with force likely to cause great bodily injury. This question lies within the court's sound discretion. We express no opinion on how the question should be resolved.⁵

⁵ In light of our determination, we do not need to address defendant's contentions that his trial counsel rendered ineffective assistance by failing to object to the trial court's errors or

III. Imposition of Separate Five-Terms for Prior Convictions Pursuant to Section 667, Subdivision (a)

The parties agree, and we concur, that the trial court erred to the extent it imposed separate five-year enhancements for prior convictions (§ 667, subd, (a)), on the two felony convictions for which sentences had been stayed (counts one and two). (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1163-1164.) Accordingly, on remand, the trial court should vacate the five-year terms imposed on counts one and two so that the judgment reflects the imposition of only two separate five-year terms imposed on count three pursuant to section 667, subdivision (a).

DISPOSITION

The matter is remanded to the trial court for resentencing in accordance with this opinion. In all other respects, the judgment is affirmed.

McGuiness, P.J.

We concur:

Pollak, J.

Siggins, J.

to demonstrate defendant's inability to pay the restitution fine and that the amount of parole revocation fine was also erroneous. On remand, the defendant may challenge the imposition of any restitution fine over \$200 on appropriate grounds including his inability to pay the fine. Because a parole revocation fine must be imposed in the same amount as the restitution fine (§ 1202.45), on remand, the trial court shall impose a parole revocation fine in the same amount as the restitution fine.