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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KEENAN KEITH SMITH,

Defendant and Appellant.

B233420

(Los Angeles County
Super. Ct. No. BA371222)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anne H. Egerton, Judge. Affirmed.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Louis W. Karlin, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Keenan Keith Smith guilty of counts 1 and 2, attempted murder and of count 3, being a felon in possession of a gun. For the purposes of count 3, defendant agreed to stipulate he had a prior conviction. The stipulation, however, was not read to the jury until *after* the People presented its case-in-chief. Defendant now contends that his motion to dismiss, made under Penal Code section 1118.1,¹ should have been granted as to count 3, because there was insufficient evidence to support that count at the time the People rested. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.²

In September 2009, Barrington Edison Armstrong was engaged to Dolores Albarenga, who had three adult children, including Emanuel Guzman and Crystal Smith. Smith was married to defendant. On September 30, Armstrong grabbed Smith to prevent her from hitting her mother, Albarenga. The next day, Armstrong was sitting in his truck with Guzman. Armstrong got out to talk to a friend, and a black car sped up, almost hitting Armstrong. Defendant got out of the black car, and he and Armstrong had a heated argument. Defendant pulled out a gun and put it in Armstrong's face. Armstrong slapped the gun, and it fell to the ground. Defendant picked it up and fired at Armstrong, who ran. Armstrong was not hurt, but his truck was hit and a bullet grazed Guzman. A few days later, on October 9, defendant shot at Armstrong, who again escaped injury.

II. Procedural background.

On August 13, 2010, a jury found defendant guilty of count 1, attempted murder (§§ 187, subd. (a), 664); count 2, willful, deliberate and premeditated attempted murder; and count 3, possession of a firearm by a person with a prior conviction (former § 12021,

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

² Because the facts underlying the crime are not relevant to the issue on appeal, we state them in brief.

subd. (a)(1)). As to counts 1 and 2, the jury found true gun-use allegations under sections 12022.5, subdivision (a) and 12022.53, subdivision (c).

On May 23, 2011, the trial court sentenced defendant, on count 2, to 14 years to life (seven years doubled under the Three Strikes law based on a prior conviction found true after a court trial) plus 20 years under section 12022.53, subdivision (c), plus 5 years under section 667, subdivision (a)(1).³

DISCUSSION

III. The record does not support defendant's contention that there was insufficient evidence to support count 3.

Because the parties' stipulation that defendant had a prior felony conviction was introduced after the People's case-in-chief, defendant now contends that his section 1118.1 motion should have been granted on the ground there was insufficient evidence he was a felon who possessed a firearm (count 3). We disagree.

A. Additional facts.

During the prosecution's case-in-chief on August 11, 2010, the court asked defense counsel whether defendant, "[o]n count 3, is he going to stipulate to the prior felony or are the People going to prove the nature of it? . . . I just need to know which jury instruction I'm pulling up. One of them says he's stipulated that he has a felony, the other one is he does not and the People prove it." The trial court explained to defense counsel that even though trial on the priors had been bifurcated, the parties still needed to reach an understanding regarding the felon in possession of a firearm count. Defense counsel agreed to give an answer that afternoon.

Later, after the People's last witness testified, the trial court had an off-the-record discussion with counsel. When asked if the People rested, the prosecutor answered, "Yes. *Subject to the admission of the exhibits and the stipulation we discussed.*" (Italics added.) The court clarified, "The stipulation we just talked about." The jury was

³ On count 1, the trial court imposed a concurrent sentence of 34 years and imposed but stayed a five-year term under section 667, subdivision (a)(1). On count 3, the court imposed a concurrent term of two years.

excused for the day, and defense counsel moved “pursuant to [section] 1118.1, to dismiss the case due to insufficiency of the evidence. I submit.”

The trial court denied the motion, and then said: “What we talked about off the record here at sidebar was, I am embarrassed to say, I couldn’t remember whether, when we used 2511, we actually presented, during the People’s case[-]in[-]chief, the stipulation to the jury of the prior felony conviction without, obviously, specifying its nature, or whether we simply instructed them that counsel had stipulated to that. So we decided to let it ride for the moment and if one of us figures out that we actually need to present a stipulation to them, we’ll do it tomorrow, even though everybody has rested.” Defense counsel did not object or otherwise say anything about the stipulation not having yet been introduced.

The trial court and counsel then had an extended discussion about other matters. During that conversation, defense counsel argued that the stipulation did not need to specify the prior conviction. The court disagreed and said that the felony defendant was stipulating to had to be identified for the record.

The next day, the trial court instructed the jury. Before reading the instruction on what is a stipulation, the court said: “This wasn’t actually said during the trial. This instruction says, during the trial you were told the People and the defense had agreed or stipulated to certain facts. As I said, there is going to be a stipulation for count 3, and when I read you the instruction on count 3, I will tell you about that.” After instructing the jury on the elements of unlawful possession of a firearm, the court said: “The defendant and the People have stipulated or agreed that the defendant was previously convicted of a felony. This stipulation means that you must accept this fact as proved. Do not consider this fact for any other purpose. Do not speculate about or discuss the nature of the conviction.”

After counsel made their closing arguments, the prosecutor expressed a concern that the stipulation needed to be “on the record.” The trial court agreed that they needed to specify which prior conviction was the subject of the stipulation. When defense counsel disagreed that such specification was necessary, the court said it would then

allow the prosecutor to reopen his case. The court told the parties it needed to modify some other instructions, but thereafter “we need to take care of the stipulation.” Defense counsel replied, “That’s fine, Your Honor.”

The jury began to deliberate, and the trial court and parties returned to the stipulation issue, with the court expressing regret it hadn’t “taken the stip” at the beginning. Defense counsel continued to argue it was unnecessary to specify which of defendant’s three prior convictions was the subject of the stipulation, but ultimately specified it was his conviction of Health and Safety Code section 11350. The court then said, “[S]o the stipulation would be in case [No.] BA327672, Mr. Smith was convicted on November 5th, 2007 of a violation of Health and Safety Code section 11350, and that’s for purposes of count 3 only, not for any prison priors.” The prosecutor and defense counsel agreed that was the stipulation.

B. *Defendant is not entitled to a reversal of his conviction of count 3.*

Defendant does not dispute he stipulated he had a prior conviction for the purposes of count 3. He instead argues that because the stipulation was not read to the jury until *after* the People rested, his section 1118.1 motion, made at the close of the People’s case-in-chief, should have been granted as to count 3 on the ground there was insufficient evidence to support it. The People respond that defendant is judicially estopped⁴ from arguing that there was insufficient evidence to support count 3. We need not decide whether estoppel applies, because there is a much simpler ground for rejecting defendant’s contention: the record does not support it.

⁴ “ ‘ ‘ ‘Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] The doctrine’s dual goals are to maintain the integrity of the judicial system and to protect parties from opponents’ unfair strategies. [Citation.] Application of the doctrine is discretionary.’ ” [Citation.] The doctrine applies when “(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.” [Citations.] [Citations.]” (*People v. Castillo* (2010) 49 Cal.4th 145, 155, italics omitted.)

At the time of the underlying offenses, section 12021, subdivision (a)(1) provided: “Any person who has been convicted of a felony . . . and who . . . has in his or her possession or under his or her custody or control any firearm is guilty of a felony.” A defendant may stipulate to his or her felon status, thereby rendering irrelevant evidence of the nature of the prior conviction. (*People v. Valentine* (1986) 42 Cal.3d 170, 173; *People v. Stewart* (2004) 33 Cal.4th 425, 478.) A stipulation relieves the prosecution of the burden of proving the defendant’s prior conviction beyond a reasonable doubt. (*People v. Little* (2004) 115 Cal.App.4th 766, 774.) Indeed, as a result of such a stipulation, the prosecutor may not produce other evidence of the nature of defendant’s prior felony conviction, thereby protecting defendant from undue prejudice that might arise from such evidence. (*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1141.)

The record here shows that defendant agreed, *before* the People rested, to stipulate he had a prior conviction, for the purposes of count 3. Then, when the People finished its case-in-chief, the prosecutor specifically said he was resting “subject to” “the stipulation we discussed.” The stipulation was thereafter read to the jury as a part of the instructions. By resting “subject to” the stipulation, the prosecutor reserved his right to introduce evidence defendant had a prior conviction. That evidence was thereafter introduced via the stipulation.

Defense counsel did not object to the prosecutor resting subject to the stipulation. In fact, at no time before or after the People rested did defense counsel state she was not entering into the stipulation or otherwise object to it. The only “objection” or concern defense counsel ever expressed regarding the stipulation was whether it was necessary to specify which of defendant’s prior convictions was the subject of the stipulation. Had defense counsel specifically raised the stipulation when she made the section 1118.1 motion or when the trial court threatened to allow the prosecutor to reopen the case to prove all elements of count 3, it is clear the prosecutor would have been allowed to present that evidence.

We therefore conclude that the record does not support the contention there was insufficient evidence of count 3.

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.