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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN DWAYNE MOORE,

Defendant and Appellant.

B239806

(Los Angeles County Super. Ct.
No. TA120677)

APPEAL from a judgment of the Superior Court of Los Angeles County, Arthur M. Lew, Judge. Affirmed in part, reversed in part and remanded.

Gloria C. Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and William N. Frank, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Kevin D. Moore was convicted by jury of first degree residential burglary with a person present, in violation of Penal Code section 459.¹ The jury was unable to reach a verdict in count 2 on a charge of attempted robbery, in violation of sections 664 and 211. In a separate proceeding, the trial court found defendant had suffered 11 prior convictions under the three strikes law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) and four serious felony prior convictions (§ 667, subd. (a)(1).)

The trial court sentenced defendant to a total of 45 years to life in state prison. For the burglary conviction, defendant was sentenced to state prison for 25 years to life pursuant to the three strikes law for the burglary. That sentence was enhanced by five years for each of the four prior serious felony convictions under section 667, subdivision (a).

In his timely appeal from the judgment, defendant contends the evidence was insufficient to prove the allegation that he suffered a section 667, subdivision (a), prior serious felony conviction in case No. A192827, because the prosecution presented no proof of the nature of the prior offense from the record of conviction. The Attorney General concedes the insufficiency of the evidence as to this one prior serious felony conviction but argues the proper remedy is to reverse the finding on the prior conviction allegation and remand to the trial court for retrial. We agree and accordingly affirm the judgment of conviction, reverse the finding that defendant suffered a prior serious felony conviction in case No. A192827, and remand the matter for further proceedings on that allegation to the trial court.²

¹ All statutory references are to the Penal Code unless otherwise stated.

² In the event the prosecution chooses not to retry the serious felony conviction, the trial court shall strike the finding from the abstract of judgment and issue a new abstract of judgment reflecting three prior serious felony convictions.

FACTS

Defendant was found inside a residence without the permission of the owner on November 3, 2011. Following a physical altercation, defendant was restrained and held for the police. A purse belonging to the resident of the home, which had been inside the house prior to the burglary, was found in the backyard, missing \$30. Defendant was in possession of \$31.35 at the time of booking.

DISCUSSION

The trial court found that defendant had suffered four prior serious felony convictions as defined in section 667, subdivision (a). Defendant argues that proof of one of those prior convictions—case No. A192827—is not supported by substantial evidence, because the prosecution failed to present any evidence to prove the nature of the offense based upon the record of conviction. The Attorney General agrees.

Proof of a prior serious felony conviction allegation under section 667, subdivision (a), has two components. First, the prosecution must prove the conviction is that of the defendant on trial. Second, the prosecution must establish the conviction is one that falls under section 667, subdivision (a). It is the latter requirement that defendant challenges.

“Normally, to establish a prior conviction allegation, the prosecutor must prove beyond a reasonable doubt all the elements of the allegation, i.e., the defendant was convicted and the conviction was of an offense within the definition of the particular statute invoked, and any other element required by the statute alleged. (*People v. Tenner* (1993) 6 Cal.4th 559, 566; *People v. Haney* [(1994)] 26 Cal.App.4th [472,] 475.)” (*People v. Henley* (1999) 72 Cal.App.4th 555, 562.) We review the trial court’s findings for substantial evidence, meaning “‘evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’” (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Jones* (1990) 51 Cal.3d 294, 314.)” (*People v. Henley, supra* at p. 561.)

After the jury convicted defendant in count 1, defendant waived a jury trial as to the recidivist allegations. Defendant's identity as the person who was convicted of the alleged prior offenses was established by fingerprint comparison.

The prosecution relied on two exhibits to establish that defendant had been convicted of first degree residential burglary in case No. A192827. The first exhibit, a prison package prepared under section 969b, showed that defendant was convicted of two counts of burglary in 1978. That package did not include an abstract of judgment or any other record of the proceedings in case No. A192827. The second exhibit, a California Law Enforcement Telecommunications System (CLETS) printout, indicated defendant was convicted in 1978 of two counts of first degree burglary. No records from case No. A192827 were presented, nor did the trial court take judicial notice of the court file. Defense counsel objected to admission of the CLETS printout on the ground it is unreliable. The prosecutor argued the printout was admissible as an official record under Evidence Code section 1280. The trial court overruled the objection.

The trial court erred in finding true the allegation that defendant suffered a serious felony conviction in case No. A192827, because there was insufficient evidence to prove *the substance* of the conviction. Our Supreme Court has held that "in determining the truth of a prior-conviction allegation, the trier of fact may look to the entire record of the conviction." (*People v. Guerrero* (1988) 44 Cal.3d 343, 355 (*Guerrero*)). In *People v. Martinez* (2000) 22 Cal.4th 106, 117-118 (*Martinez*), our Supreme Court clarified that *Guerrero* addressed only the scope of proof to establish the substance of a prior conviction, but it did not consider proof of "other aspects of a prior conviction, such as the identity of the defendant or service of a prior prison term." Accordingly, "*Guerrero* establishes that the trier of fact may look to the entire record of conviction to determine 'the substance of the prior conviction. [Citation.]' (*People v. Reed* (1996) 13 Cal.4th 217, 223.) Its limitations apply only to proof of 'the circumstances of the prior crime.' (*Id.* at p. 225.)" (*Martinez, supra*, at p. 118.)

At issue here is the substance of the alleged prior convictions in case No. A192827. The prosecution presented no documents from the record of conviction to

establish that defendant was convicted of residential burglary in case No. A192827. Neither the section 969b prison package nor the CLETS printout regarding case No. A192827 constitutes any part of the record of the conviction, as required by *Guerrero*. (See *People v. Scott* (2000) 85 Cal.App.4th 905, 913, fn. 11 (*Scott*) [discussion the meaning of record of conviction].) Because the two exhibits contain no competent evidence from the record of conviction that defendant had been convicted of a serious felony in case No. A192827, we must reverse the true finding as to that allegation. (*Id.* at p. 914.) The proper remedy is to remand the issue to allow the prosecution the opportunity to retry the prior conviction allegations in case No. A192827. (*People v. Jenkins* (2006) 140 Cal.App.4th 805, 813-816; *Scott, supra*, at pp. 914-918.)

DISPOSITION

The findings that defendant suffered a serious felony conviction under section 667, subdivision (a), in case No. A192827, is reversed and remanded to the trial court. In all other respects, the judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.