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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIE TEE GEAR,

Defendant and Appellant.

C062314

(Super. Ct. No. 09F00596)

Defendant appeals the trial court's finding that his 1987 prior conviction for aggravated battery, sustained in Illinois, qualified as a serious felony under Penal Code section 1192.7, subdivision (c)(8).<sup>1</sup> He contends his plea was an *Alford* plea<sup>2</sup> that did not

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<sup>1</sup> Further undesignated statutory references are to the Penal Code.

<sup>2</sup> *North Carolina v. Alford* (1970) 400 U.S. 25 [27 L.Ed.2d 162] (*Alford*).

provide an independent factual basis to prove the underlying conduct, because he did not admit the conduct and he asserted an affirmative defense. We disagree. Defendant did not put forth an affirmative defense and did not maintain his innocence. Thus, we find defendant's plea admitted the conduct required to establish the Illinois offense was a serious felony. Accordingly, we affirm the judgment.

### **RELEVANT FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

The substantive facts underlying defendant's conviction are not relevant to any issue on appeal and are therefore not recounted.

Defendant was charged with first degree robbery (§ 211), assault with a deadly weapon (§ 245, subd. (a)(1)), false imprisonment (§ 236), severing a telephone line (§ 591), and falsely identifying himself to a police officer (§ 148.9, subd. (a)). As to the robbery, it was also alleged defendant had personally used a knife during the commission of the offense. (§ 12022, subd. (b)(1).) It was further alleged defendant had served three prior prison terms (§ 667.5, subd. (b)) and had one prior serious felony conviction. (§§ 1192.7, subd. (c), 667, subds. (b)-(i), 1170.12.) The trial court bifurcated the prior conviction allegations from the substantive offenses. Following a trial, the jury found defendant guilty on all five counts and found the personal use of a knife allegation true.

Before trial on the prior convictions, the parties submitted a number of legal issues to the court, including whether the 1987 aggravated battery conviction in Illinois qualified as a serious felony under section 1192.7, subdivision (c)(8). The information charged defendant "did commit the offense of aggravated battery, in that defendant did knowingly cause great bodily harm to Jeffrey S. Town, in that defendant did shoot Jeffrey S. Town, in violation of Paragraph 12-4(a), Chapter 38, Illinois Revised Statutes." The transcript of the plea proceedings reflects the Illinois court asked defendant for details of the offense.

"THE COURT: Can you tell me what occurred on August 21st insofar as Jeffrey Town is concerned? Where did this happen?"

“THE DEFENDANT: Evergreen -- Evergreen.

“THE COURT: Was this inside?

“THE DEFENDANT: It was outside.

“THE COURT: On the street?

“THE DEFENDANT: Yeah.

“THE COURT: What was he doing?

“THE DEFENDANT: Driving down the street.

“THE COURT: In a car?

“THE DEFENDANT: Yeah, taxicab.

“THE COURT: Taxicab. Did you stop him?

“THE DEFENDANT: No. Some other dude did. They stopped him, I came down there.

“THE COURT: You knew what was going on?

“THE DEFENDANT: Yes, sir.

“THE COURT: Did you take his wallet from him?

“THE DEFENDANT: Yes, sir, we did.

“THE COURT: Did you take money -- was there money in it?

“THE DEFENDANT: Yes, sir.

“THE COURT: Did you have permission to take his wallet and its contents?

“THE DEFENDANT: No, sir.

“THE COURT: Did you threaten him in any way or how did you get it from him?

“THE DEFENDANT: We threatened him.

“THE COURT: Did you?

“THE DEFENDANT: Yes, sir.

“THE COURT: Did you have a gun?

“THE DEFENDANT: Yeah, we did.

“THE COURT: Who had the gun?

“THE DEFENDANT: Earle.

“THE COURT: Earle.

“THE DEFENDANT: Then I had got it.

“THE COURT: Then you got it?

“THE DEFENDANT: Yeah.

“THE COURT: Did you get it -- did you get the wallet by pointing the gun at him or what?

“THE DEFENDANT: Yes.

“THE COURT: And I take it -- did he get out of the cab?

“THE DEFENDANT: Yes.

“THE COURT: Who shot him?

“THE DEFENDANT: I did.

“THE COURT: Where on his body?

“THE DEFENDANT: Up about here.

“THE COURT: Upper body. That all happened in Kankakee County?

“THE DEFENDANT: Yes -- yes, sir.

“MR. WASHINGTON [defense attorney]: May I ask a question please? Why did you shoot the gun?

“THE DEFENDANT: Because they had threatened me.

“MR. WASHINGTON: Who?

“THE DEFENDANT: Earle Jarrett.

“MR. WASHINGTON: How?

“THE DEFENDANT: About shooting me.

“MR. WASHINGTON: What did they say?

“THE DEFENDANT: If I don't do it we're going to shoot you.

“THE COURT: They threatened to kill you?

“THE DEFENDANT: Uh-huh.

“MR. WASHINGTON: That’s why you did it? Nothing further.

“THE COURT: What happened to the gun, Willie -- do you know?

“THE DEFENDANT: Let me see, I had gave [*sic*] it to one of my friends and then he gave it to another dude, then the dude gave it back to me, he set me up and I got caught with it. [¶] . . . [¶]

“THE COURT: As to the 86-CF-235, the Court is satisfied that the Defendant is entering into this plea freely and voluntarily, that he knowingly and intelligently waives his rights and is by his own admission 18 years of age, that the Defendant has established a factual basis for this plea and the Court will enter a judgment of conviction on the plea to the information charging . . . aggravated battery.”

Defendant also stated he committed the offense while under the influence of alcohol and marijuana.

The trial court found the Illinois offense qualified as a prior serious felony, because defendant had admitted to personally using a gun to shoot a robbery victim in the upper body. Following a jury trial on the prior conviction and prison term allegations, the jury found the allegations true.

The trial court sentenced defendant to an aggregate term of 21 years in prison, comprised of the upper term of six years for the robbery conviction, doubled pursuant to the strike conviction, plus one additional year for the knife enhancement, one year for each of the three prior prison term enhancements, and five years for the prior serious felony enhancement. The trial court stayed sentence on the remaining counts under section 654.

## **DISCUSSION**

Defendant contends his Illinois conviction did not qualify as a serious felony, because the transcript of his plea shows he entered an *Alford* plea, in which he agreed to plead guilty to an offense for which he claimed he was innocent. Defendant contends in entering this plea he asserted an affirmative defense, compulsion, which rendered him

innocent of the crime. As such, he continues, in the absence of an independent source establishing the factual basis for the plea, the plea colloquy is insufficient to establish the offense qualifies as a serious felony. He also contends without the plea colloquy to establish defendant's specific conduct, the Illinois offense of aggravated battery does not qualify as a serious felony.

“Under the Three Strikes law, a prior conviction from another jurisdiction constitutes a strike if it is ‘for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.’ (Pen.Code §§ 667, subd. (d)(2), 1170.12, subd. (b)(2).)” (*People v. Jenkins* (2006) 140 Cal.App.4th 805, 810.) “[T]he relevant inquiry in deciding whether a particular prior conviction qualifies as a serious felony for California sentencing purposes is limited to an examination of the record of the prior criminal proceeding to determine the nature or basis of the crime of which the defendant was convicted.” (*People v. McGee* (2006) 38 Cal.4th 682, 691.) “To make this determination, the court may consider the entire record of the prior conviction as well as the elements of the crime.” (*People v. Avery* (2002) 27 Cal.4th 49, 53.) When a defendant challenges the sufficiency of the evidence to sustain the trial court's finding that the prosecution has proven all elements of the enhancement, we must determine whether substantial evidence supports that finding. “ ‘The test on appeal is simply whether a reasonable trier of fact could have found that the prosecution sustained its burden of proving the enhancement beyond a reasonable doubt.’ [Citation.]” (*People v. Rodriguez* (2004) 122 Cal.App.4th 121, 129.) In making this determination, we review the record in the light most favorable to the trial court's findings. (*Ibid.*)

On April 20, 1987, defendant was convicted of aggravated battery in violation of section 12-4 (a) of the Illinois Criminal Code of 1985, which at the time provided: “A person who, in committing a battery, intentionally or knowingly causes great bodily

harm, or permanent disability or disfigurement commits aggravated battery.” (Ill. Rev. Stat. ch. 38, § 12-4(a) (1985).)

In California, “any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice,” personally uses a firearm, or personally uses a dangerous or deadly weapon is a serious felony. (§ 1192.7, subds. (c)(8) & (c)(23).) To “personally inflict” an injury, the defendant must act to directly cause the injury, and not just proximately cause it. (*People v. Rodriguez* (1999) 69 Cal.App.4th 341, 347.) A finding of “great bodily harm” under Illinois law is sufficient to sustain a finding of “great bodily injury” under California law, because those elements are the same. (*People v. Washington* (2012) 210 Cal.App.4th 1042, 1048.) A gunshot wound constitutes great bodily injury. (See *People v. Lopez* (1986) 176 Cal.App.3d 460, 464; *People v. Wolcott* (1983) 34 Cal.3d 92, 106-108.)

In this case, the record of conviction shows defendant was charged with committing aggravated battery, “in that Defendant did knowingly cause great bodily harm to Jeffrey S. Town in that Defendant did shoot Jeffrey S. Town.” Defendant admitted he personally used a gun to shoot Town in the upper body. To avoid the implications of his admissions in the plea colloquy, defendant now claims that in entering the plea, he asserted he had acted under the threat of being shot himself; that is, he acted under compulsion, which constituted a complete affirmative defense in Illinois and transformed his plea to an *Alford* plea.<sup>3</sup>

### **Affirmative Defense of Compulsion**

In Illinois, before entering judgment on a plea, the trial judge must determine the conduct the defendant has admitted is sufficient to sustain the charge to which the

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<sup>3</sup> “An *Alford* plea is ‘an arrangement in which a defendant maintains his innocence but pleads guilty for reasons of self-interest.’ [Citation.]” (*United States v. King* (4th Cir. 2012) 673 F.3d 274, 281 (*King*).)

defendant is pleading guilty. (*People v. Edmonds* (1973) 15 Ill.App.3d 1073, 1078-1079 [305 N.E.2d. 346, 351].) A plea of guilty should not be accepted if a defense worthy of consideration exists. (*People v. Ramos* (1982) 110 Ill.App.3d 225, 228 [441 N.E.2d 1153, 1154].)

The Illinois defense of compulsion is defined as follows: “ ‘(a) A person is not guilty of an offense, other than an offense punishable with death, by reason of conduct which he performs under the compulsion of threat or menace of the imminent infliction of death or great bodily harm, if he reasonably believes death or great bodily harm will be inflicted upon him if he does not perform such conduct.’ ” (Ill. Rev. Stat. ch. 38, § 7-11(a) (1987).)

“The defense of compulsion is an affirmative defense which the State need not disprove unless the defendant has introduced sufficient evidence of compulsion to raise an issue of fact creating a reasonable doubt as to the defendant’s guilt. [Citations.]” (*People v. Williams* (1981) 97 Ill.App.3d 394, 403 [422 N.E.2d 1091, 1098-1099].) To raise the defense of compulsion, “a defendant must demonstrate that he performed the charged offense under the compulsion of threat or menace of the imminent infliction of death or great bodily harm. [Citation.] The defense of compulsion requires an impending threat of great bodily harm together with a demand that the person perform a specific criminal act, and a threat of future injury is not enough to raise the defense. [Citations.] The defense is not available, however, if the compulsion arises from negligence or fault of the defendant or if the defendant had ample opportunities to withdraw from the criminal enterprise but failed to do so. [Citations.] Moreover, a defense of compulsion is only a defense with respect to the conduct demanded by the compeller. [Citations.]” (*People v. Humphries* (1994) 257 Ill.App.3d 1034, 1044 [630 N.E.2d 104, 111].) In the absence of any threat of the imminent infliction of death or great bodily harm or the reasonable belief that such would be inflicted upon a refusal to participate, “the quantum of evidence necessary to raise the affirmative defense of

compulsion [is] lacking.” (*People v. Gray* (1980) 87 Ill.App.3d 142, 150 [408 N.E.2d 1150, 1156].)

Here, defendant claimed he shot Town because Earle Jarrett threatened to shoot defendant if he did not. By accepting defendant’s guilty plea in the face of his claim he had been threatened, the Illinois trial court implicitly found defendant had not asserted a defense worthy of consideration. The record supports this finding. Defendant made no claim that the threat to shoot him was immediate or imminent, nor did he offer any basis on which a belief of such violence against him would be reasonable. Defendant also proffered an alternate reason for committing this offense, that he was under the influence of drugs and alcohol. On this record, the defense of compulsion was not adequately raised and the state did not have the burden to disprove the affirmative defense.

(*People v. Davis* (1974) 16 Ill.App.3d 846, 848 [306 N.E.2d 897, 898].)

### ***Alford Plea***

An *Alford* plea is a plea of guilty with a protestation of innocence or a denial of the facts supporting the charges. (*Alford, supra*, 400 U.S. at pp. 37-38.) “A trial court may accept an *Alford* plea when: (1) the defendant ‘intelligently concludes that his interests require entry of a guilty plea;’ and (2) ‘the record before the judge contains strong evidence of actual guilt.’ [Citation.] [¶] The ‘distinguishing feature’ of an *Alford* plea is that the defendant does not confirm the factual basis underlying his plea. [*United States v. Alston* [(4th Cir. 2010)] 611 F.3d [219,] 227 (citing *United States v. Savage* [(2d Cir. 2008)] 542 F.3d 959, 962 . . .).]” (*King, supra*, 673 F.3d at p. 281.) Because a defendant who enters an *Alford* plea does not, by design, confirm the factual basis for his plea, the government cannot rely on any factual admission during the plea colloquy to establish the predicate nature of his conviction. (*United States v. Savage* (2d Cir. 2008) 542 F.3d 959, 967.) Defendant relies on this limitation on the use of *Alford* pleas to prove prior convictions as the basis of his argument that there is insufficient evidence to support the trial court’s finding.

In this case, defendant did not claim innocence or deny the facts supporting the charges. Rather, the record demonstrates he expressly and personally admitted the conduct required to establish the offense, that he personally used a gun to rob Town and personally shot Town in the upper body. Defendant's bare statement that he acted under a threat, which is insufficient to raise an affirmative defense, also does not constitute a claim of innocence. Furthermore, what distinguishes an *Alford* plea from other pleas is the fact that "the defendant does not confirm the factual basis underlying his plea." (*King, supra*, 673 F.3d at p. 281.) It is this distinguishing feature that precludes the use of the factual basis of an *Alford* plea to establish the conduct in a prior conviction. (*United States v. Alston* (2010) 611 F.3d 219, 226-228.) Here, however, defendant *did* confirm the factual basis underlying his plea when he admitted he personally shot Town. There were multiple opportunities for defendant to challenge his factual guilt, but he did not. Nor did defendant protest his innocence or signal in any way that he was interested in an *Alford* plea. Thus, this record does not support the claim that defendant entered an *Alford* plea and "[w]e refuse to dress a perfectly ordinary guilty plea in *Alford* garb in order to avoid" a prior conviction enhancement. (*United States v. Taylor* (4th Cir. 2011) 659 F.3d 339, 347.)

Where, as here, the plea colloquy shows the defendant confirmed the factual basis for the plea and made admissions upon entering the plea, those factual admissions are made part of the conviction. (*Shepard v. United States* (2005) 544 U.S. 13, 20-21 [161 L.Ed.2d 205]; see also *United States v. Rosa* (2d Cir. 2007) 507 F.3d 142, 158.) As such, they may be used to establish the conduct supporting the conviction. In entering his plea, defendant admitted the conduct that makes the offense a serious felony in California; that is, that he robbed Town at gunpoint and personally inflicted great bodily injury on Town by shooting him in the upper body. Accordingly, there was substantial evidence supporting the trial court's finding that defendant's prior conviction was a serious felony.

**DISPOSITION**

The judgment is affirmed.

\_\_\_\_\_ RAYE \_\_\_\_\_, P. J.

We concur:

\_\_\_\_\_ ROBIE \_\_\_\_\_, J.

\_\_\_\_\_ BUTZ \_\_\_\_\_, J.