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

THE PEOPLE,

Plaintiff and Respondent,

v.

GERALD HACKETT,

Defendant and Appellant.

C064509

(Super. Ct. No. 08F04155)

A jury convicted defendant Gerald Hackett of committing four assaults with a firearm (Pen. Code, § 245, subd. (b))¹ against Paul Ma’ae, Douglas Ducart, Eric James, and Inga Lopes. The jury also convicted defendant of being a convicted felon in possession of a firearm (§ 12021, subd. (a)(1)), and found true allegations that defendant personally used a firearm in committing the assaults against Ma’ae, Ducart, James, and Lopes (§ 12022.5, subs. (a) & (d)).

¹ Undesignated statutory references are to the Penal Code.

The trial court found defendant had six prior felony convictions, three of which were strikes within the meaning of sections 667, subdivisions (b) through (i), and 1170.12. The trial court also found that defendant failed to prove he was not guilty by reason of insanity.

On appeal, defendant contends (1) the prosecution engaged in group bias by using two peremptory challenges in a racially discriminatory manner, (2) the trial court violated his confrontation rights when accepting the parties' stipulation to the admission of psychological reports into evidence during the sanity phase of trial, and (3) insufficient evidence supports the trial court's finding that he has three prior serious felony convictions.

We conclude that the record shows the trial court properly concluded the prosecution did not engage in group bias in exercising its peremptory challenges. We find defendant waived his confrontation rights when the defense stipulated that the court could consider the psychologists' reports. And, we reject defendant's challenges to the sufficiency of the evidence showing he has three prior strikes. As the People point out, the abstract of judgment mistakenly indicates that defendant received concurrent life terms for assaults with a firearm when the trial court actually imposed consecutive sentences. Accordingly, we affirm defendant's convictions but direct the trial court to correct the abstract of judgment.

FACTUAL AND PROCEDURAL HISTORY

Prosecution Evidence

On May 15, 2008, several residents of the Los Robles Apartments complex in Sacramento were hanging out on the front lawn. At approximately 10:00 p.m., 15-year-old Ducart left his apartment to talk to his mother, Kristy Terry. Ducart was holding his mother's cell phone when defendant appeared. Defendant was waving a handgun around and angrily ranting that he had cancer.

Defendant began accusing the other tenants of stealing his phone. He put his gun to Ducart's head and Ducart implored, "I don't want any problems. Please don't shoot me." Defendant responded, "[Y]ou shut your mouth, or I'll blow your fucking head off." Terry told defendant, "[T]hat's my 15 year old son. You have a gun to his head." Defendant pointed the gun at her and threatened, "[S]hut up bitch, I'll kill you." Ducart turned and ran back toward the apartments. As Ducart hid behind a pillar, he heard a gunshot hit a window above his head.

Eric James went outside to try to calm defendant down with promises to send a friend to the store to buy some beer. Defendant pointed the gun to James's head and declared, "I'm going to fucking kill you." Ma'ae, who was nearby, went over to defendant and pushed defendant's hand to point the gun away from James's head. The push by Ma'ae caused defendant to fall to the ground and hit his head on the dirt. When defendant attempted to get up, he fell back to the ground on his face.

Ma'ae turned and began to walk back to his apartment. Defendant yelled at Ma'ae, "[Y]ou pushed me. Now I'm going to kill you." Defendant shot Ma'ae twice. Lopes threw herself on Ma'ae, her husband, to protect him. Lopes screamed, "No, no" and pushed the gun away. Defendant put the gun to Lopes's head, called her a bitch and threatened to kill her too. Defendant then walked away.

City of Sacramento police officers responded to the scene and arrested defendant. A blood sample drawn from defendant after his arrest indicated his blood alcohol content was .20 percent.

Defense Evidence

The defense called Janice Nakagawa, a licensed psychologist, as a witness. Dr. Nakagawa testified that, at the time of the offenses, defendant suffered from a psychotic spectrum disorder with depression, which caused him to experience hallucinations, delusional thinking, and paranoia. Dr. Nakagawa opined that a person with defendant's mental illness might lack the capacity to form the specific intent to kill.

After the jury found defendant guilty of four counts of assault with a firearm, a bench trial ensued on the question of defendant's sanity at the time of the offenses. The parties submitted the issue of defendant's sanity on the reports of three doctors, including Dr. Nakagawa, in addition to Dr. Nakagawa's testimony at trial. The court found that

defendant failed to prove his insanity at the time of the offenses.

The trial court sentenced defendant to a prison term of 236 years to life, comprising a determinate term of 100 years consecutive to a term of 136 years to life. Defendant timely filed a notice of appeal.

DISCUSSION

I

Peremptory Challenges

Defendant contends the trial court erroneously denied his *Batson/Wheeler*² motions after the People engaged in group bias by using peremptory challenges to excuse two African-Americans from the jury. We are not persuaded.

A.

Jury Selection

Prospective Juror: N.

The court excused the first prospective African-American juror based on a claim of hardship. The next prospective African-American juror, N., was called to the jury box after the first round of peremptory challenges had been made. The court asked N. about his involvement in a domestic violence incident. N. explained that he was arrested in 2005 after a dispute with his girlfriend. Although he spent two days in jail, he never was charged. N. stated he was initially upset with the officers

² *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69] (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

because they had not also arrested his girlfriend. Nonetheless, he did not believe the incident would affect his evaluation of testimony by police officers.

During the next round of peremptory challenges, the prosecutor excused N. Defense counsel made a *Wheeler* motion.³ Without requiring a prima facie showing of race discrimination, the trial court asked the People to respond. The prosecutor stated: "As to [N., he] is an African-American gentleman for the record. [¶] He indicated that he, himself, was arrested for a domestic violence issue back in 2005 and that had been between himself and his girlfriend. [¶] He indicated that he did not think that it was fair and that he was arrested and that his girlfriend was not also arrested in that case. [¶] He indicated that no charges were filed. However, he did say that he did think he was not happy with law enforcement at the time of the arrest. [¶] But then thereafter since charges weren't filed he still thinks that he would be able to be fair with law enforcement. [¶] But given that experience of domestic violence is typically a crime of violence against another person that they're close to and that he had that unfortunate experience with law enforcement, I would be excusing him for that purpose."

Defense counsel replied, "We didn't have real access to his questionnaire because we couldn't read it, so we used the

³ Although defendant cited only *Wheeler* in making his motion, this "sufficed to preserve his *Batson* claim for appeal." (*People v. Vines* (2011) 51 Cal.4th 830, 847, fn. 7.)

Court's copy. [¶] I think he sufficiently qualified his answer that everything related to that domestic violence. [¶] Any dissatisfaction he felt with the police was at that time back then. Now he says he could be a fair, impartial juror. [¶] I thought he was articulate. I -- his answers were clear and concise. Everything related to the arrest back at that time, and I think he would be -- could be a fair impartial juror now. I don't think anything he said will rise to a reason to strike him. [¶] He is an African American gentleman. My client is an African American gentleman. They come from the same cognizable class of individuals, African American heritage from my view. And I would ask the Court to take Court recognition of that."

The prosecutor responded: "I also state that there is domestic violence history in the defendant's past. That is one of the priors that if the defendant were to testify, I would be impeaching him with. [¶] And it is one of his prior convictions that I would intend to bring out through Dr. Nakagawa in relation to her testimony and considering what she considered in making her determination about mental illness suffered by the defendant. In fact, that he has a prior history of violence. That is something she should have considered. That maybe she was more dismissive with. [¶] It's the same type of crime that [N.] had been arrested for. [¶] I also think that there are kind of -- this case deals with issues of control and domination by the defendant. I think those are also issues that go along with domestic violence as well. [¶] So that's another reason I would

be dismissing [N.] because of his personal experience with those."

The trial court denied the defense's motion and found the People's stated reasons for exercising a peremptory challenge against N. to be credible.

Prospective Juror: G.

The court then questioned another African-American juror, G., about two answers on his questionnaire form. G. had stated that he was serving as a grand juror and that he was under a court-appointed conservatorship. G. quickly admitted that neither answer was correct.

The prosecutor used a peremptory challenge to excuse G. Defense counsel again moved for a mistrial under *Wheeler*. The defense asserted that G. was a "person of color" and "appears to be [a] person of African American descent." The trial court again asked the prosecutor to respond without requiring the defense to make a prima facie showing of group bias.

The prosecutor explained, "On the first day he had requested a hardship in relation to this case and indicated -- indicating he's working two jobs, that he did not believe he got paid for both jobs. I believe he did confirm that he did get paid for Costco Wholesale. [¶] And then in relation to the other job, I can't recall what he said, but given the fact that he had requested a hardship that he's working two jobs. [¶] I didn't believe that he was particularly articulate when we were speaking with him during the hardship time. [¶] When we did receive his jury forms, he did mark off two boxes of the jury

form saying that he was serving as a grand juror and saying that he was under an appointed conservatorship, either showing that he really wasn't paying much attention when completing out the form, or if he had some confusion with completing out the form and what the terms are. [¶] I just think that he wasn't very much -- putting much effort into being a juror in this case. That he doesn't necessarily want to serve as a juror. [¶] And just given observations of him, I would prefer to not have him sit on this jury, especially when I think there are going to be some difficult issues that they're going to need to pay attention to, specific details in this case with certain legal issues of the mental defense and so forth. [¶] And I think, from what we've seen, that he hasn't been paying that close attention."

Defense counsel replied that "anybody could make a mistake" on the form and noted that G. had qualified his answer when questioned by the court. The defense asserted that removing a person of color because he asked for a hardship would "undermin[e] . . . this process."⁴

⁴ We note that the defense had earlier made comments that supported the hardship request of another African-American juror. In that instance, defense counsel noted that the prospective juror suffered health problems in addition to the loss of income that rendered jury service a hardship. The defense also used a peremptory challenge to excuse an African-American juror.

The trial court denied the *Wheeler* motion made in response to the dismissal of G., finding that the People articulated credible, race-neutral reasons for excusing G. from the jury.

After two days of voir dire, the trial court empanelled a jury that included two African-American, a Hispanic, a Filipino, and two Asian jurors.

B.

Comparison Jurors

Pertinent to the resolution of defendant's contentions are the answers given by five jurors who actually served on the jury, specifically jurors 2, 4, 6, 10, and 11.

Juror 2

Juror 2 expressed a concern that "on a subconscious level" he might not be unbiased. However, he stated that he would do his best to evaluate a witness's credibility based on the trial and not on his own prior experiences. Juror 2 acknowledged having a close, 10-year friendship with a sheriff, but stated he had no problem in evaluating a witness's credibility whether or not he or she was a peace officer.

Juror 2 had a positive experience with law enforcement when his spouse was a victim of a home invasion robbery. Juror 2 had a brother and a brother-in-law who had been charged with crimes. Juror 2 noted that his brother had been arrested several times in the past and was treated fairly by the criminal justice system.

Juror 4

Juror 4's spouse had been a victim in "a situation" but was not injured. Someone was arrested but not charged for the unidentified offense. The arrested person, however, was charged in an unrelated case with armed robbery. Juror 4 was satisfied with the outcome of both cases. Juror 4's spouse had previously interacted with the prosecutor's office, but the juror himself did not attend any of the related court hearings.

Juror 6

Juror 6's spouse of 19 years is a retired San Jose Police officer who had handled cases similar to this case. Juror 6 expressed no problem with evaluating credibility irrespective of the witness's vocation. Juror 6's son had been arrested for driving while intoxicated but nothing about the situation undermined her ability to be fair.

Juror 10

Juror 10 had been involved in a "wet reckless" driving incident and was treated fairly by law enforcement. This juror had no concerns "at all" about how peace officers had handled the incident.

Juror 11

Juror 11's uncle was shot on a bus in Oakland, but no one was prosecuted for the offense. Juror 11's cousin was shot and killed by the cousin's boyfriend. The juror believed that her cousin's boyfriend should have been convicted of murder and received a longer sentence than that imposed. Nonetheless, Juror 11 recognized that her cousin's case was different from

the current case. Juror 11 had also been the victim of a hit and run. Initially, she was not comfortable sitting on the present case. Juror 11 asked for private voir dire to explain that she was not comfortable responding to questions while her spouse's ex-wife was a prospective juror on the same jury panel. However, she ultimately stated that it was the right thing to do and that she would do her best to be fair.

C.

Basic Principles

"The use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution (*People v. Wheeler*, [*supra*, 22 Cal.3d at pp. 276-277]) as well as the equal protection clause of the Fourteenth Amendment to the United States Constitution (*Batson v. Kentucky*, [*supra*,] 476 U.S. [at p.] 89)." (*People v. Ward* (2005) 36 Cal.4th 186, 200 (*Ward*).)

In determining whether to grant a *Batson/Wheeler* motion, the trial court must employ a three-part test. "First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the [trial] court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion

regarding racial motivation rests with, and never shifts from, the opponent of the strike." (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613 (*Lenix*); *People v. Mills* (2010) 48 Cal.4th 158, 173.)

"The proper focus of a *Batson/Wheeler* inquiry, of course, is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, *not* on the objective *reasonableness* of those reasons. [Citation.] So, for example, if a prosecutor believes a prospective juror with long, unkempt hair, a mustache, and a beard would not make a good juror in the case, a peremptory challenge to the prospective juror, sincerely exercised on that basis, will constitute an entirely valid and *nondiscriminatory* reason for exercising the challenge.

[Citation.] It matters not that another prosecutor would have chosen to leave the prospective juror on the jury. Nor does it matter that the prosecutor, by peremptorily excusing men with long unkempt hair and facial hair on the basis that they are specifically biased against him or against the People's case or witnesses, may be passing over any number of conscientious and fully qualified potential jurors. All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being *nondiscriminatory*. "[A] "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection. [Citations.]" (*People v. Reynoso* (2003) 31 Cal. 4th 903, 924.)

We review a trial court's ruling on a motion for mistrial based on group bias in the exercise of a peremptory challenge under the substantial evidence standard. (*Ward, supra*, 36 Cal.4th at p. 200.) Thus, we assess the propriety of "a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges "with great restraint.'" [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]' [Citation.] '[I]n fulfilling [this] obligation, the trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's [nondiscriminatory] reason for exercising a peremptory challenge is being accepted by the court as genuine. This is particularly true where the prosecutor's [nondiscriminatory] reason for exercising a peremptory challenge is based on the prospective juror's demeanor, or similar intangible factors, while in the courtroom.' [Citation.]" (*Id.* at p. 200.)

D.

The People's Explanations for the Peremptory Challenges

Here, the trial court did not require the defense to make prima facie showings of discriminatory use of peremptory challenges by the People. Thus, we proceed to consider whether

substantial evidence supports the trial court's finding that the prosecutor's stated reasons for excusing N. and G. were race neutral. (*Lenix, supra*, 44 Cal.4th at p. 613, fn. 8.)

As to N., the record shows that he was still angry that he had been arrested in 2005 for a domestic violence incident when his girlfriend was not also arrested. "A prospective juror's negative experience with the criminal justice system, including arrest, is a legitimate, race-neutral reason for excusing the juror." (*People v. Cowan* (2010) 50 Cal.4th 401, 450.) The record also supports the People's race-neutral concern that N. had been involved in a domestic violence situation. The prosecutor intended to introduce defendant's domestic violence record to impeach him and in cross-examining his mental health expert.

The record also supports the prosecutor's concern that G.'s answers on his jury questionnaire were inaccurate. The prosecutor further noted that G. wanted to be excused from the jury by claiming he would not get paid during jury service. The prosecutor concluded, based on the request for hardship excuse and inattention to the jury questionnaire, that the juror wanted to be excused. The People's concern about this prospective juror's inaccuracy in answering questions on his jury questionnaire was race neutral. And, G.'s own request to be excused for hardship was consistent with a race-neutral concern that he simply did not wish to serve on the jury. (See *Lenix, supra*, 44 Cal.4th at p. 613.)

Defendant claims that a comparative juror analysis shows the prosecutor's reasons for excusing the two prospective African-American jurors were "unsupported by the record" and "inherently implausible." Defendant asserts that jurors 4, 6, 10, and 11, all had negative experiences with the criminal justice system, as did N., but were not challenged for such reason.⁵ We are not persuaded.

Defendant did not engage in a comparative juror analysis at trial. Even so, "comparative juror analysis must be considered" for the first time on appeal if the defendant relies on such evidence and "the record is adequate to permit the urged comparisons." (*Lenix, supra*, 44 Cal.4th at p. 622.) However, as our Supreme Court has cautioned, "comparative juror analysis on a cold appellate record has inherent limitations" due to the fact that, "[o]n appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact." (*Id.* at p. 622.) Additionally, we note that because defendant has waited until appeal to advance a comparative juror analysis, "such evidence will be considered in view of the deference accorded the trial court's ultimate finding of no

⁵ Defendant does not explain how the comparative juror analysis applies to G.

discriminatory intent." (*Id.* at p. 624, citing *Hernandez v. New York, supra*, 500 U.S. at p. 365 [114 L.Ed.2d at p. 409].)

Unlike N., none of the comparison jurors were arrested for personal involvement in domestic violence or stated that they had prior negative experiences with law enforcement. Moreover, defendant has not identified the race of the comparison jurors.⁶ Thus, defendant has not met his burden of establishing that the trial court erred in finding the prosecutor's reasons for excusing N. to be race-neutral.

Defendant asserts that the prosecutor only questioned the jurors as a group, asking N. and G. no follow-up questions. Desultory voir dire by a prosecutor before exercising a peremptory challenge to a prospective juror "may contribute to a suspicion that this juror was removed on the basis of race. This suspicion, along with other factors, may lead to an inference of intentional discrimination." (*U.S. v. Esparza-Gonzalez* (9th Cir. 2005) 422 F.3d 897, 905.) However, in this case, the trial court conducted most of the voir dire and used jury questionnaires. The prosecutor voir dired the jury as did defendant's attorney. The information elicited showed race-neutral reasons for excusing both prospective African-American jurors. The lack of questioning by the prosecutor does not establish group bias.

⁶ Significantly we note that one of the comparison jurors, juror 11, is African-American.

Finally, we note that defendant's jury did include two African-Americans. "While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection.' [Citation.]" (*Ward, supra*, 36 Cal.4th at p. 203.)

We find no error in the trial court's denial of defense counsel's *Batson/Wheeler* motions.

II

Stipulation to Allow the Trial Court to Consider Psychologist Reports During the Sanity Phase of Trial

Defendant contends his confrontation rights were violated at the sanity phase because he was denied the opportunity to confront the psychologists whose reports were submitted to the court. In so arguing, defendant does not assert that he received ineffective assistance of counsel. We conclude that defendant has waived this issue.

As this court has previously explained, "The confrontation right is not absolute. (*People v. Johnson* (1974) 39 Cal.App.3d 749, 754.) . . . 'A waiver of the right of confrontation can take various forms. In some instances, an accused may voluntarily consent to forego his right of confrontation. . . . By stipulating to the admission of evidence, the defendant waives the right to confront the source of the evidence. *United States v. Martin*, 489 F.2d 674, 678 (9th Cir. 1973) cert. denied, 417 U.S. 948, 41 L.Ed.2d 668 (1974); see *Williams v.*

Oklahoma, 358 U.S. 576, 584, 3 L.Ed.2d 516 (1959); *Diaz v. United States*, 223 U.S. 442, 451, 56 L.Ed. 500 (1912).” (*Herbert v. Superior Court* (1981) 117 Cal.App.3d 661, 667-668.) Similarly, our high court has noted, “[e]videntiary stipulations have long been recognized as tactical trial decisions which counsel has discretion to make without the express authority of the client. [Citations.] Counsel’s authority to stipulate to evidentiary facts exists in criminal as well as civil cases.” (*People v. Adams* (1993) 6 Cal.4th 570, 578 (*Adams*).)

In this case, the parties stipulated that the trial court could consider all three psychologists’ reports, all the guilt phase evidence, and Dr. Nakagawa’s testimony at an Evidence Code section 402 hearing.

The defense had the prerogative to stipulate to the court’s consideration of three psychologists’ reports during the sanity phase of trial. (*Adams, supra*, 6 Cal.4th at p. 578.) Based on the stipulation, the trial court did not violate defendant’s confrontation rights when it considered the proffered reports. (*Ibid.*)

III

Sufficiency of the Evidence for Three of Defendant’s Five Prior Serious Felony Convictions

Defendant contends insufficient evidence supports the trial court’s finding that he had three prior strikes for (1) a 1979 conviction for assault with a deadly weapon, (2) a 1993 conviction for spousal abuse, and (3) a 1993 conviction for assault with a deadly weapon. We reject the contentions.

A.

Proof of Prior Serious Felony Convictions

Our high court examined the People's burden of proof to establish a defendant's prior convictions in *People v. Delgado* (2008) 43 Cal.4th 1059, 1065-1067 (*Delgado*). In pertinent part, the *Delgado* court explained, "The People must prove each element of an alleged sentence enhancement beyond reasonable doubt. [Citation.] Where . . . the mere fact that a prior conviction occurred under a specified statute does not prove the serious felony allegation, otherwise admissible evidence from the entire record of the conviction may be examined to resolve the issue. [Citations.]

"A common means of proving the fact and nature of a prior conviction is to introduce certified documents from the record of the prior court proceeding and commitment to prison, including the abstract of judgment describing the prior offense. [Citations.]

"'[The] trier of fact is entitled to draw reasonable inferences from certified records offered to prove a defendant suffered a prior conviction' [Citations.] '[O]fficial government records clearly describing a prior conviction presumptively establish that the conviction in fact occurred, assuming those records meet the threshold requirements of admissibility. [Citation.] Some evidence must rebut this presumption before the authenticity, accuracy, or sufficiency of the prior conviction records can be called into question.' [Citation.]

"Thus, if the prosecutor presents, by such records, prima facie evidence of a prior conviction that satisfies the elements of the recidivist enhancement at issue, and if there is no contrary evidence, the fact finder, utilizing the official duty presumption, may determine that a qualifying conviction occurred. [Citation.]

"However, if the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense. [Citations.] In such a case, if the statute under which the prior conviction occurred could be violated in a way that does not qualify for the alleged enhancement, the evidence is thus insufficient, and the People have failed in their burden. [Citations.]

"On review, 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 that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt. [Citations.]" (*Delgado, supra*, 43 Cal.4th at pp. 1065-1067.)

B.

1979 Assault with a Deadly Weapon

The People introduced a packet of certified documents from the 1979 case in which defendant was convicted of assault with a deadly weapon (§ 245, subd. (a)(1)). A minute order shows that

defendant pleaded guilty to assault with a deadly weapon (a knife) and by means of force likely to produce great bodily injury in exchange for dismissal of other charges and a promise of no state prison at the outset. Defendant later waived the promise of no state prison. As part of the plea agreement, the sentencing court struck the enhancements for use of a deadly weapon and use of force likely to result in great bodily injury when it imposed a state prison term of two years.

In the present case, the trial court concluded that the People had established the conviction as a serious felony. Defendant argues that there were no facts showing the assault to be a serious felony because the enhancements for knife use (§ 12022, subd. (b)) and infliction of great bodily injury (§ 12022.7) were stricken by the original sentencing court. We disagree.

Defendant's prior offense -- assault with a deadly weapon -- is listed as a serious felony (§ 1192.7, subd. (c)(31)) and does not depend on additional allegations of personal infliction of great bodily injury or use of a deadly weapon (§ 1192.7, subd. (c)(8), (23)).

We also reject defendant's reliance on *People v. Bueno* (2006) 143 Cal.App.4th 1503 (*Bueno*) and *People v. Thoma* (2007) 150 Cal.App.4th 1096 (*Thoma*). Neither case provides him with support.

In *Bueno, supra*, 143 Cal.App.4th 1503, the Court of Appeal considered whether a conviction for battery with serious bodily injury (§ 243, subd. (d)) was a strike prior. Battery with

serious bodily injury is not a strike unless the defendant personally inflicts great bodily injury or personally uses a deadly or dangerous weapon or firearm. (§ 1192.7, subd. (c)(8), (23).) In *Bueno*, the defendant did not admit the allegations that would have rendered the offense a serious felony. Thus, the appellate court reversed the trial court's finding of a prior strike. (*Bueno, supra*, 143 Cal.App.4th at pp. 1507-1511.) By contrast, defendant in this case admitted the commission of an offense -- assault with a deadly weapon -- that necessarily constitutes a serious felony. (§ 1192.7, subd. (c)(31).) The fact that additional enhancement allegations were later stricken at the original sentencing does not change the character of the offense that defendant admitted.

Thoma presented the issue of whether a conviction for driving under the influence causing bodily injury constituted a strike. (*Thoma, supra*, 150 Cal.App.4th at p. 1099.) The offense constitutes a strike prior if the defendant personally inflicted great bodily injury (§ 1192.7, subd. (c)(8)). (*Thoma*, at p. 1100.) The *Thoma* court concluded that insufficient evidence supported the strike prior finding because an adoptive admission made after the entry of the plea did not serve to establish the nature of the admitted offense. (*Id.* at p. 1102.) The appellate court also rejected hearsay evidence as insufficient to establish the serious nature of a felony conviction. (*Id.* at p. 1104) The present case does not involve proof based on a post-plea adoptive admission or by hearsay testimony.

The record establishes that, in 1979, defendant admitted he assaulted the victim with a knife. Consequently, proof of his plea to assault with a deadly weapon sufficed to establish the conviction as a serious felony. (§ 1192.7, subd. (c)(31).)

C.

1993 Spousal Abuse Conviction

The People introduced another packet of certified documents from defendant's 1993 conviction for felony spousal abuse (§ 273.5) and assault with a deadly weapon (§ 245, subd. (a)(1)) to prove that he had a prior strike.

The packet of documents contains verdict forms showing that the jury convicted defendant of felony spousal abuse and found that he personally used a deadly or dangerous weapon (§ 12022, subd. (b)). The jury also convicted defendant of assault with a deadly weapon or instrument or by force likely to produce great bodily injury (§ 245, subd. (a)(1)).

In 1993, the sentencing court stated: "I am inclined to sentence the defendant and fix the base term based on . . . spousal abuse, because I consider that to be the accurate and essential crime that he has committed -- I would certainly sentence him to the high term on [that] count, and I would certainly impose the use of the weapon." With respect to the assault offense, the court stated: "[For] the assault with a deadly weapon, I will stay the imposition of judgment and sentence pursuant to . . . section 654 since the same act, same immediate course of conduct that is the basis of the spousal abuse is in fact the basis of the assault with a deadly weapon."

In the current case, the People argued the evidence was sufficient to support a finding that the spousal abuse conviction was a strike because a weapon use enhancement attached. The trial court in this case concluded that the 1993 assault conviction constituted a strike.

On review, we agree with the trial court that the 1993 conviction for felony spousal abuse with personal use of a deadly or dangerous weapon is a serious felony. (§ 1192.7, subd. (c)(23).)

"[A]ny felony in which the defendant personally used a dangerous or deadly weapon" is a serious felony. (§ 1192.7, subd. (c)(23).) Defendant's personal use of a deadly weapon in the commission of spousal abuse was established by the prior jury's finding that defendant personally used a deadly or dangerous weapon within the meaning of former section 12022, subdivision (b).⁷ Section 12022, subdivision (b), has been construed to refer to the use of "instrumentalities that are weapons in the strict sense, such as guns and blackjacks; and instrumentalities which may be used as weapons but which have

⁷ In 1993, section 12022, subdivision (b), provided: "Any person who personally uses a deadly or dangerous weapon in the commission or attempted commission of a felony shall, upon conviction of such felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of one year, unless use of a deadly or dangerous weapon is an element of the offense of which he or she was convicted." (Stats. 1989, ch. 1284, § 2, pp. 5058-5059.)

nondangerous uses, such as hammers and pocket knives." (*People v. Burton* (2006) 143 Cal.App.4th 447, 457.) Thus, defendant was found to have personally used a deadly weapon in the commission of his offense so that it constituted a serious felony.

In arguing against this conclusion, defendant relies on *People v. Aguilar* (1997) 16 Cal.4th 1023. *Aguilar* is inapposite because it holds only that hands and feet are not deadly weapons for purposes of the assault "with a deadly weapon" as defined by section 245. (*Aguilar, supra*, at pp. 1028-1030, 1034.) Nothing in his case suggests defendant should receive the benefit of the holding in *Aguilar* because he used only his hands or feet in committing the felony spousal abuse. Accordingly, the trial court did not err in concluding the spousal abuse conviction was a prior strike.

D.

1993 Assault with a Deadly Weapon Conviction

The documents in support of the 1993 assault with a deadly weapon conviction reveal a difference between the verdict form and the abstract of judgment. Specifically, the verdict form notes that the jury found defendant guilty of "assault with deadly weapon or instrument *or by force likely to produce great bodily injury.*" (Italics added.) By contrast, the abstract of judgment indicates that defendant was convicted of "ADW," which indicates assault with a deadly weapon. Defendant contends the difference between the documents means that it is impossible to tell whether he was convicted of section 245, subdivision

(a)(1), for assault with a deadly weapon or by means likely to result in great bodily injury.

If the defendant committed the offense with a deadly weapon, it was a strike. However, if the assault was committed by means of force likely to result in great bodily injury, the trial court in this case would have erred in concluding it constituted a serious felony for sentence enhancement purposes. As our high court has explained, "'assault with a deadly weapon' is a serious felony. (§ 1192.7, subd. (c)(31).) On the other hand, while serious felonies include all those 'in which the defendant *personally inflicts* great bodily injury on any person' (*id.*, subd. (c)(8), italics added), *assault merely by means likely to produce GBI, without the additional element of personal infliction, is not included in the list of serious felonies.* Hence, . . . a conviction under the deadly weapon prong of section 245(a)(1) is a serious felony, but a conviction under the GBI prong is not." (*Delgado, supra*, 43 Cal.4th at p. 1065, italics changed.)

We conclude that the conflict was resolved by the trial court in 1993 when it determined that sentence for the assault with a deadly weapon should be stayed because it was "the same act, same immediate course of conduct," as the spousal abuse conviction. Thus, the court found that the offense was actually an assault with a deadly weapon *and* by means of force likely to produce great bodily injury.

The original sentencing court would have erred in applying section 654 if the convictions had not resulted from the same

act. Being the same act, the findings for the spousal abuse conviction supplied the necessary means to render the assault with a deadly weapon a strike as well. In so concluding, we reject defendant's contention that section 654 might have applied even if the spousal abuse and assault were committed one after another -- and therefore, perhaps, by different means. Here, the record made by the 1993 sentencing court clearly indicates that both convictions arose out of the "same immediate course of conduct." Thus, we find sufficient evidence supports the trial court's finding that defendant's 1993 conviction for assault with a deadly weapon was a serious felony. (§ 1192.7, subd. (c)(31).)

The trial court in the present case did not err in finding that defendant sustained three prior serious felony convictions.

IV

Clerical Error in the Abstract of Judgment

As the People point out, the abstract of judgment must be corrected to reflect the trial court's imposition of consecutive, rather than concurrent, life terms for the assaults with a semi-automatic weapon in counts four, six, and seven. Accordingly, we order the abstract of judgment corrected. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

DISPOSITION

The judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment reflecting that the sentences imposed on counts four, six, and seven are to run

consecutively, and to forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

_____ HOCH _____, J.

We concur:

_____ RAYE _____, P. J.

_____ BUTZ _____, J.