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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

NATHANIEL KINSEY,

Defendant and Appellant.

C068191

(Super. Ct. No. SF113959A)

A jury convicted defendant Nathaniel Kinsey of assault by means of force likely to produce great bodily injury or with a deadly weapon (Pen. Code, § 245, subd. (a)(1))¹ and found true an allegation that defendant personally inflicted great bodily injury

¹ Undesignated statutory references are to the Penal Code.

(§ 12022.7, subd. (a)). The trial court found true allegations that defendant had a prior serious felony conviction (§§ 1170.12, subd. (b), 667, subds. (a)(1), (d)) and had served a prior prison term within the last five years (§ 667.5, subd. (b)). Defendant was sentenced to a 17-year state prison term.

On appeal, defendant contends there is insufficient evidence to support the trial court's finding that his prior conviction for violating section 245 was a serious felony and a strike. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND²

Defendant waived jury trial on the prior conviction allegations. To prove the strike and serious felony allegations, the prosecution submitted a section 969, subdivision (b) prison packet, which included an abstract of judgment for defendant's 1986 San Mateo County conviction. The abstract of judgment indicated that defendant was convicted of violating section "245(a) ASSAULT W/FIREARM ON PERSON" and that a section 12022.7 enhancement allegation had been found true. The abstract further indicated that defendant was sentenced to a six-year prison term consisting of a three-year midterm for the section 245 offense and a consecutive three-year term for the enhancement.

Defendant's counsel submitted a change of plea form for the 1986 offense, which stated that defendant was charged with sections 664/187, 245, 12022.5, and 12022.7. The form further stated that defendant desired to plead no contest to "245 PC. + 1203.075 special allga. of great bodily injury." A transcript of the change of plea and sentencing hearing was not introduced.

² Since defendant's appeal addresses only the prior strike and serious felony findings, it is unnecessary to set forth the facts underlying the crime for which defendant was convicted.

The prosecutor argued the abstract showed that defendant was convicted of assault with a firearm in violation of section 245, with a section 12022.7 enhancement. The defense countered that the plea form did not show defendant pleading to the section 12022.7 enhancement, and that assault with a firearm was covered by subdivision (b) of section 245. The trial court found the strike and serious felony allegations to be true.

DISCUSSION

Defendant contends there is insufficient evidence that his 1986 conviction for assault was a serious felony. We disagree.

The People bear the burden of proving every element of a sentence enhancement beyond a reasonable doubt. (*People v. Miles* (2008) 43 Cal.4th 1074, 1082.) “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.] . . . [¶] 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. [Citations.] [¶] 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.]” (*People v. Delgado* (2008) 43 Cal.4th 1059, 1066-1067 (*Delgado*).)

The trial court found that defendant’s 1986 conviction was for section 245, subdivision (a)(2), “assault with a firearm on a person causing great bodily injury.” Since section 245, subdivision (a)(2) does not contain a great bodily injury component,³ the trial court implicitly found that a great bodily injury allegation had been sustained. Thus, there are two grounds for the trial court’s finding that defendant suffered a serious felony conviction and a strike -- assault with a firearm in violation of section 245 is a serious felony (§ 1192.7, subd. (c)(31)), and any felony in which the defendant personally inflicts great bodily injury on a person other than an accomplice is also a serious felony (§ 1192.7, subd. (c)(8)).

Defendant argues the record was too ambiguous for the trial court to make either finding. He notes the abstract states defendant pled no contest to section 245, subdivision (a), rather than subdivision (a)(2). Section 245, subdivision (a) is divided into two provisions -- (a)(1) defines assault with a deadly weapon other than a firearm or by means of force likely to produce a great bodily injury, while (a)(2) defines assault with a firearm. While assault with a firearm and assault with a deadly weapon are serious felonies, assault by means of force likely to produce great bodily injury is not a serious felony unless it also involves the use of a deadly weapon or results in the infliction of great bodily injury. (*People v. Banuelos* (2005) 130 Cal.App.4th 601, 605.) Applying the rule of *Delgado*, defendant argues the purported ambiguity in the abstract here must

³ Section 245, subdivision (a)(2) defines assault with a firearm as: “Any person who commits an assault upon the person of another with a firearm[.]”

be interpreted to the least serious form of the offense, assault by means of force likely to produce great bodily injury.

Defendant's argument ignores the abstract's description of the offense, "ASSAULT W/FIREARM ON PERSON." As in *Delgado*, the trial court here was not required to assume this descriptive language was mere surplusage. (*Delgado, supra*, 43 Cal.4th at p. 1071.) Instead, the trial court could reasonably infer from the abstract that defendant's crime was assault with a firearm in violation of section 245, subdivision (a)(2).

Defendant also ignores the fact that the abstract unambiguously states that defendant sustained a section 12022.7 enhancement for personally inflicting great bodily injury. And defendant further ignores that the abstract shows he was sentenced to an additional three years in state prison for the enhancement. Although the change of plea form was not a model of clarity, it is reasonable to read the form's description of the offenses to which defendant desired to plead -- "245 PC. + 1203.075 special allg. of great bodily injury" -- as referring to defendant's desire to admit an enhancement for great bodily injury in addition to entering a plea to the section 245 offense.⁴ Since the form lists section 12022.7 as one of the charged enhancements and defendant was sentenced to an additional three-year term for that enhancement,⁵ the trial court here could reasonably conclude that the abstract correctly described defendant as having sustained a section 12022.7 enhancement.

As reflected in the abstract, defendant's 1986 crime and enhancement qualify defendant's prior conviction as a serious felony offense. Therefore, the abstract is

⁴ The term "1203.075" likely refers to section 1203.075, a statute that prohibits probation when great bodily injury is inflicted during the commission of enumerated offenses. The list of offenses does not include section 245.

⁵ The other charged enhancement, section 12022.5, addresses personal use of a firearm.

substantial evidence supporting the trial court's true finding as to the strike and serious felony enhancements.

DISPOSITION

The judgment is affirmed.

MURRAY, J.

We concur:

ROBIE, Acting P. J.

BUTZ, J.