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

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THE PEOPLE,  Plaintiff and Respondent,  v.  MICHAEL ODIS JOHNSON,  Defendant and Appellant.	C069180  (Super. Ct. No. SF117090A)
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Defendant Michael Odis Johnson pled guilty to second degree robbery, admitted a prior strike conviction, and admitted a vulnerable victim enhancement allegation under Penal Code section 667.9, subdivision (a)<sup>1</sup> in exchange for dismissal of another charge and four prior prison term sentencing enhancement allegations and the promise of a seven-year prison sentence.

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<sup>1</sup> We will refer to this enhancement as the victim over 65 enhancement to distinguish it from a related vulnerable victim enhancement under Penal Code section 667.9, subdivision (b), which we will refer to as the victim over 65 with a prior enhancement which was not charged in this case. All further undesignated section references are to the Penal Code.

The court sentenced him accordingly to a three-year term for the robbery charge, doubled the term for the prior strike, and added one year for the victim over 65 enhancement.

Defendant appeals. He contends the trial court erroneously imposed an unauthorized sentence for the victim over 65 enhancement because subdivision (a) of section 667.9 does not apply in this case and he did not admit violating the statute that he contends *does* apply -- the victim over 65 with a prior enhancement -- subdivision (b) of that same section. He is wrong. We affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

The facts underlying defendant's convictions are not relevant to the issue he raises on appeal. Accordingly, we will not discuss them.

In March 2011, defendant was charged with second degree robbery and elder abuse. In regard to the robbery charge, it was further alleged that defendant knew the victim was over the age of 65 (the victim over 65 enhancement) and that defendant previously served four separate terms in state prison.

In July 2011, the complaint was amended to add a sentence enhancement for a prior strike conviction for robbery, which would double the term for the robbery charge. Pursuant to a plea agreement, defendant pled guilty to the robbery charge, admitted the prior strike conviction, and admitted the victim over 65 enhancement allegation. The elder abuse charge and the prior prison term allegations were dismissed in the interest of justice and in light of defendant's plea.

The court sentenced defendant to the middle term of three years in prison for the robbery, doubled the term for the prior strike, plus one year, consecutive, for the victim over 65 enhancement, for a total of seven years in prison. However, the clerk's minutes and the abstract of judgment *erroneously* showed the one-year consecutive term was imposed for a prior prison term rather than for the victim over 65 enhancement he admitted. Defendant filed a timely notice of appeal.

In April 2012, a week after defendant filed his opening brief on appeal, the superior court filed an amended abstract of judgment to show that the one-year consecutive term was in fact for the victim over 65 enhancement, rather than for a prior prison term as erroneously reflected in the original abstract.

#### DISCUSSION

Based on the error in the original abstract of judgment defendant contends the one-year consecutive term constituted an unauthorized sentence.<sup>2</sup> In his view, the victim over 65 with a prior enhancement applies, but he could not be sentenced under that provision because he did not admit violating it.

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<sup>2</sup> Defendant also contended the term was unauthorized because he did not admit a prior prison term enhancement, but that argument was based on the fact that when he filed his opening brief, the clerk's minutes and the original abstract of judgment erroneously showed that this term was imposed for a prior prison term enhancement. As we have noted already, after defendant filed his brief, the trial court corrected the abstract of judgment to show that this term was, in fact, imposed for the section 667.9, subdivision (a) victim over 65 enhancement. Accordingly, we need not address this alternate argument.

Subdivision (b) of section 667.9 provides that "[a]ny defendant who commits a violation of subdivision (a) and who has a prior conviction for any of the offenses specified in subdivision (c), shall receive a two-year enhancement for each violation in addition to the sentence provided under Section 667." Defendant contends that because he admitted a prior robbery conviction along with admitting the victim over 65 enhancement, as a matter of law, he was subject to the two-year victim over 65 with a prior enhancement under section 667.9, subdivision (b) and therefore the one-year victim over 65 enhancement under section 667.9, subdivision (a) was an unauthorized sentence. We disagree.

For a defendant to be lawfully subject to a sentence enhancement, the enhancement must be alleged in the complaint and either admitted by the defendant or found true by the trier of fact. (§ 1170.1, subd. (e).) Under section 1170.1, subdivision (e), in order for the two-year victim over 65 with a prior enhancement to apply, that enhancement would have to have been alleged, and either proven or admitted. Here, although defendant admitted a prior strike conviction and the one-year victim over 65 enhancement allegation, contrary to what defendant contends, the victim over 65 with a prior enhancement does not apply because this particular enhancement *was never alleged in the complaint and neither proven nor admitted*. Therefore, we conclude the sentence was not unauthorized because defendant was correctly sentenced to the one-year victim over 65

enhancement under section 667.9, subdivision (a), which was alleged in the complaint and which he admitted.<sup>3</sup>

DISPOSITION

The judgment is affirmed.

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ROBIE, J.

We concur:

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NICHOLSON, Acting P. J.

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HOCH, J.

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<sup>3</sup> Because we conclude defendant was properly sentenced for the victim over 65 enhancement, we need not address his argument that he received ineffective assistance of counsel if this court "chooses to impose the two-year enhancement, or directs the trial court to do so."