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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.

WILLIAM HENRY THOMAS,

Defendant and Appellant.

C073150

(Super. Ct. No. 11F07604)

A jury acquitted defendant William Henry Thomas of inflicting corporal injury on a cohabitant but convicted him of an attempt to do so. (Pen. Code, §§ 273.5, subd. (a), 664.)<sup>1</sup> In bifurcated proceedings, the trial court found a strike prior (§§ 667, subds. (b)-(i), 1170.12) to be true.

Sentenced to state prison, defendant appeals. He contends counsel rendered ineffective assistance by failing to object based on inadmissible hearsay grounds to the

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<sup>1</sup> Undesignated section references are to the Penal Code.

narrative portion of the exhibit used by the prosecution to prove the strike prior. We reject defendant's contention and will affirm the judgment.

### **FACTS AND PROCEDURAL HISTORY**

A recitation of the facts underlying the charged offense is not necessary in view of the issue raised on appeal. The information alleged that defendant had been convicted of a prior serious felony in 2004. To prove the strike prior, the People introduced into evidence an exhibit that included the charging document, which charged battery with serious bodily injury (§ 243, subd. (d)) as follows: “[D]efendant did willfully and unlawfully use force and violence upon the person of Kyle Hendrickson-Belport, resulting in the infliction of serious bodily injury on such person.”<sup>2</sup> The charging document alleged that the offense was a serious felony within the meaning of section 1192.7, subdivision (c). The charging document includes the following statement underneath the serious felony allegation: “That attached hereto and by this reference incorporated herein is a declaration setting forth facts in support of probable cause for the issuance of a warrant of arrest herein.” The unsigned declaration by the prosecutor in turn incorporated by reference a warrant request by a sheriff's detective summarizing the factual basis of the offense. The warrant request states: About 6:00 p.m. on November 22, 2002, “Victim Kyle Hendrickson was approached by suspect [21-year-old] William Thomas while [Hendrickson] was walking down the street. [Thomas] punched [Hendrickson] in the face with his fist for no apparent reason. Witnesses told [Hendrickson] to run because [Thomas] was intoxicated. [Hendrickson] fled and called the Sheriff's Department. Deputies arrived and apprehended [Thomas]. [Thomas] was advised of his Miranda Rights and stated that he had been drinking and had been

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<sup>2</sup> The victim's typewritten last name, “Henderson,” is crossed out; handwritten in its place is “Hendrickson-Belport” and the handwriting appears to be initialed “DRS.” The magistrate who presided over the preliminary hearing was Judge D. Robert Shuman.

involved in a fight with 3-6 individuals and was defending himself. [Thomas] was arrested-booked by Deputies. No charges were filed due to the fact that the arrest report was not received by the District Attorney's Office in time. [¶] [Hendrickson] sustained an injury to hi[s] two front teeth which required emergency medical attention at a hospital." A handwritten note states that Hendrickson lost his two front teeth. The exhibit also includes minutes of the proceedings, a minute order reflecting defendant's no contest plea to the offense (he did *not* admit the serious felony allegation), and the abstract of judgment reflecting that the court imposed the upper term of four years for the offense.

The bench trial on the prior was scheduled for the same day as sentencing. On December 7, 2012, defense counsel requested a continuance of sentencing to prepare a motion to strike the strike prior, commenting that he had "no problem submitting on the paperwork, but I do ask the court to exercise its discretion to strike the strike for a variety of reasons, which I need to put in writing." The court granted the continuance.

Defense counsel filed a motion requesting that the court strike the strike prior due to the relatively minor nature of the current felony or, in the alternative, that the court reduce the underlying offense to a misdemeanor. The People filed opposition to the motion to strike the strike prior, arguing inter alia that defendant's prior violence "is of such an egregious nature, that it should still be heavily considered by the court."

At the continued trial on the prior and sentencing, the court first considered the strike prior allegation, noting that the prosecutor had submitted an exhibit to prove the prior. Defense counsel had no comment or argument on the validity of the strike prior and submitted on the exhibit. The court stated that it had reviewed the exhibit and found the strike prior true beyond a reasonable doubt, that defendant "did, in fact, suffer a prior conviction, violation of Penal Code section 243(d), battery with serious bodily injury . . . ." After argument by the parties, the court denied the motion to reduce the underlying offense to a misdemeanor and to strike the strike prior.

## DISCUSSION

Defendant contends defense counsel rendered ineffective assistance by failing to object to the narrative portion of the prosecutor's exhibit, that is, the sheriff's warrant request which defendant claims constituted inadmissible hearsay because the document was not part of the record of conviction. We conclude that defendant has failed to demonstrate counsel's performance was deficient and thus reject his contention.

To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the defendant suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692 [80 L.Ed.2d 674, 693-694, 695-696]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." (*Strickland, supra*, 466 U.S. at pp. 687-688 [80 L.Ed.2d at p. 693].) In determining whether counsel's performance was deficient, we must exercise "deferential scrutiny" (*Ledesma, supra*, 43 Cal.3d at p. 216) and refrain from engaging in "the perilous process of second-guessing" counsel's rational tactical decisions (*People v. Miller* (1972) 7 Cal.3d 562, 573). Where the record does not contain an explanation for the challenged aspect of representation, the judgment must be affirmed on appeal unless counsel was asked for an explanation and failed to provide one or there simply could be no satisfactory explanation. (*People v. Pope* (1979) 23 Cal.3d 412, 425-426.) Counsel's decision whether to object to evidence is usually a tactical one and rarely establishes incompetence. (*People v. Boyette* (2002) 29 Cal.4th 381, 433.)

Defendant's conviction for the offense of battery with serious bodily injury under section 243, subdivision (d) is not itself a strike prior but may be a strike prior if defendant personally inflicted the harm. (§ 1192.7, subd. (c)(8); *People v. Bueno* (2006) 143 Cal.App.4th 1503, 1508 (*Bueno*).) To prove that the prior is a violent or serious felony, the trier of fact may "look beyond the judgment to the entire record of the

conviction,’ ” “ ‘but no further.’ ” (*People v. Trujillo* (2006) 40 Cal.4th 165, 177, italics omitted (*Trujillo*); see *People v. Guerrero* (1988) 44 Cal.3d 343, 345, 355-356.) “The normal rules of hearsay generally apply to evidence admitted as part of the record of conviction to show the conduct underlying the conviction.” (*People v. Woodell* (1998) 17 Cal.4th 448, 458; see *People v. Roberts* (2011) 195 Cal.App.4th 1106, 1116.)

The charging document included a serious felony allegation, but there is no evidence in the record that defendant admitted the allegation, so it does not constitute proof that the offense was a serious felony. (§ 969f; *Bueno, supra*, 143 Cal.App.4th at p. 1510.) The unsworn statement of facts in the sheriff’s warrant request is not the type of “record documents reliably reflecting the facts of the offense for which the defendant was convicted.” (*People v. Reed* (1996) 13 Cal.4th 217, 223; *Trujillo, supra*, 40 Cal.4th at p. 179.) Without an admission of the serious felony allegation and absent the factual statement in the warrant request, there is no admissible evidence in the record of conviction to reflect that defendant’s battery with serious bodily injury conviction is a serious felony because there is no evidence that defendant personally inflicted the harm.

Defense counsel did not object at all to the prosecutor’s evidence to prove the prior and had no occasion to explain his reason for not doing so. Instead, defense counsel submitted on the exhibit. On appeal, defendant does not argue that he did not personally inflict the harm, and he has forfeited the evidentiary issue by his failure to object at trial.

He complains his counsel was ineffective in failing to object. However, we can conceive of a legitimate reason why defense counsel did not object to the inadmissible hearsay in the exhibit. The warrant request did not give many details concerning the offense or reflect the investigation. Had defense counsel objected, the prosecutor would have been required to present admissible evidence, such as the preliminary hearing transcript (*Trujillo, supra*, 40 Cal.4th at p. 177), to show defendant personally inflicted the harm, which may have reflected a more violent nature to the offense than that reflected in the warrant request. Defense counsel chose instead to focus his attention on a

motion to strike the strike prior and to reduce the underlying offense to a misdemeanor, which might have been helped even less by a more detailed recitation of the facts underlying the strike prior. Because there could be a rational basis for not objecting to the inadmissible hearsay, defendant has failed to demonstrate that counsel's performance was deficient. We reject defendant's ineffective assistance of counsel claim.

**DISPOSITION**

The judgment is affirmed.

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

We concur:

\_\_\_\_\_ NICHOLSON \_\_\_\_\_, J.

\_\_\_\_\_ HOCH \_\_\_\_\_, J.