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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE FUENTES,

Defendant and Appellant.

D058057

(Super. Ct. No. SCE289962)

APPEAL from a judgment of the Superior Court of San Diego County, John M. Thompson, Judge. Affirmed in part, reversed in part, and remanded with directions.

INTRODUCTION

A jury convicted Jesse Fuentes of aggravated mayhem (Pen. Code, § 205; count 1),¹ attempted murder (§§ 187, subd. (a), 664; count 2), assault by means likely to produce great bodily injury (§ 245, subd. (a)(1); count 3), and attempted robbery (§§ 211, 664; count 4). As to counts 1 through 3, the jury found true allegations Fuentes personally used a deadly and dangerous weapon (§§ 1192.7, subd. (c)(23); 12022,

¹ Further statutory references are also to the Penal Code unless otherwise stated.

subd. (b)(1)). As to counts 2 and 3, the jury also found true allegations Fuentes personally inflicted great bodily injury on the victim (§ 12022.7, subd. (a)).² Fuentes admitted having two prior prison convictions (§ 667.5, subd. (b)), two prior serious felony convictions (§ 667, subd. (a)(1)), and two prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The trial court dismissed one of the prior strike convictions and sentenced Fuentes to an aggregate term of 14 years to life plus 13 years in state prison.

Fuentes appeals, contending we must reverse his attempted robbery conviction because the trial court failed to sua sponte instruct the jury on a claim-of-right defense and there was insufficient evidence of felonious intent as he was attempting to recover his own money. Additionally, he contends the trial court improperly used the same prior conviction as both a prior serious felony conviction enhancement and a prior prison conviction enhancement. He also contends the trial court improperly imposed prior prison and serious felony conviction enhancements for each count of the determinate portion of his sentence. Finally, he requests we order several modifications to the abstracts of judgment.

² As to counts 2 through 4, at the prosecution's request, the trial court dismissed allegations Fuentes personally inflicted great bodily injury causing the victim to become comatose (§ 12022.7, subd. (b)). As to count 4, also at the prosecution's request, the trial court dismissed allegations Fuentes personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)) and personally inflicted great bodily injury on the victim (§ 12022.7, subd. (a)).

The People concede the sentencing errors and do not oppose the requested modifications to the abstracts of judgment. We remand the matter to the trial court to correct the sentencing errors and make the requested modifications to the abstracts of judgment. In all other respects, we affirm the judgment.

BACKGROUND

Prosecution Evidence

David Rose was in the laundry room of his apartment complex on Oakdale Avenue in El Cajon when he heard "a commotion" across the street. He looked out the window and saw Fuentes arguing with David Roney. Rose watched the men for a minute or two, then continued doing his laundry. He looked out the window a few minutes later when the arguing became louder. He saw Fuentes standing over Roney, who was lying on the ground in a fetal position.

Fuentes continued yelling at Roney while kicking and punching Roney in the face. Rose went out to the curb and, from approximately 30 feet away, yelled for Fuentes to stop. Fuentes continued beating Roney, punching him four to six times and kicking him three to six times in the head and chest.

Fuentes removed Roney's shorts, shook them as if he was looking for something, and tossed them aside. Fuentes then picked up a rock and started "pounding" Roney's head with it, hitting Roney at least three or four times.

Rose again yelled for Fuentes to stop, but Fuentes ignored him. Rose ran to the apartment manager's office, alerted her to what was happening, and she called the police.

El Cajon Police Sergeant Eric Taylor was patrolling the street in front of the apartment complex when he saw Roney lying on the sidewalk. Taylor got out of his patrol car and walked toward Roney. There was a large amount of blood on the ground near Roney's head. Roney was naked from the waist down. His shorts and a softball-size rock with blood on it were lying next to him.

Rose and the apartment manager drew Taylor's attention to Fuentes, who was walking down the street. Taylor yelled for Fuentes to stop and Fuentes started running. Taylor ran after Fuentes. When Taylor got to within approximately five to 10 feet of Fuentes, Fuentes stopped and lay down on the ground in a prone position.

Fuentes had blood on his left pant leg and right shoe. He smelled of alcohol and had a scrape or bruise on the left side of his abdomen.

Defense Evidence

Fuentes testified he left his house on the date of the incident with approximately \$260 from a recently cashed unemployment check. He bought two cans of beer and two small bottles of tequila. He went to find a place to drink and saw Roney drinking at a bus stop. He went to the bus stop and started drinking there, too. The two men started talking. Roney introduced himself to Fuentes as "Buddha."

Fuentes shared his beer and tequila with Roney. The two chatted and discovered they were both on parole. Roney told Fuentes he was on parole for "bashing somebody's head" and that "he ran with the Woods, which is the Caucasian group in the prison."

The two left the bus stop and went to a nearby convenience store where Fuentes bought them more beer. Fuentes bought Roney's beer because Roney said he did not

have any money. While they continued drinking, the subject of methamphetamine came up. Roney told Fuentes he could get Fuentes an eighth of an ounce of methamphetamine for \$200. Fuentes said, "Let's go do it." After Fuentes bought them some more beer, Roney took Fuentes to an apartment complex on Grape Street. Fuentes gave Roney the money. Roney said he would be right back and went into the complex.

Fuentes waited for Roney for about 45 minutes and then started walking around looking for him. When he neared the apartment complex on Oakdale Avenue, Fuentes saw Roney sitting on a bicycle talking to a group of Hispanic men. Fuentes headed toward Roney. As Roney rode away from the men, Fuentes confronted Roney and demanded his money back. Roney denied knowing Fuentes or what he meant. He told Fuentes to get away from him.

Fuentes continued to demand his money and told Roney he was not going to let Roney out of his sight. Roney got off the bicycle, picked up a rock, approached Fuentes, and told Fuentes he was going to "smash" him. Fuentes "rushed" Roney, the rock fell, and the two men started fighting. Fuentes punched and kicked Roney approximately 10 times. They ended up on the ground with Roney holding Fuentes in a headlock and threatening to kill him. Fuentes tried to bite Roney, but Roney stuck two fingers in Fuentes's nose to pull Fuentes's head away.

Thinking Roney was going to kill him, Fuentes picked up the rock and struck Roney two times in the back of his head with it. Roney fell to the ground. He grabbed Fuentes's belt and pulled Fuentes on top of him. Fuentes hit Roney in the face and chest, while asking Roney to let him go and to give him back his money. When Roney

eventually released Fuentes, Fuentes searched Roney's shorts. People started yelling at Fuentes and coming toward him. Fuentes still wanted his money, however, so he pulled Roney's shorts down figuring he could take them and search them later. He noticed Roney did not have any underwear on. He shook the shorts and change came out. He threw the shorts down and started walking away.

When he saw the police, he started running because he was on parole. After running about half a block, he put up his hands and lay on the ground.

Fuentes told the police that he had been trying to help Roney, who he said had done a "drug rip" on four or five Hispanic males and had been beaten up by them. He also told the police he got the scratch on his abdomen two days earlier, although he had actually gotten it during his fight with Roney.

Fuentes admitted having prior convictions for robbery, assault by means likely to produce great bodily injury, and possession of methamphetamine for sale. On cross-examination, he also admitted participating in a race-related riot while in jail awaiting the trial in this case.

Alejandro Lara testified³ he had previously met a girl named Marie while at a market buying beer. Lara told her he had fought with his wife and needed a place to stay. Marie told him about the motel where she was staying. Lara gave Marie a ride back to the motel where she introduced him to Roney, whom she referred to as "Buddha." While

³ At the time of his testimony, Lara was in custody on a driving under the influence charge.

Lara was sitting down drinking beer, Roney came out of the bathroom and hit Lara in the head with a hammer. After Lara fled the room, he realized his wallet was missing, which had \$500 in it.

Rebuttal Evidence

After his arrest, Fuentes told police officers that four or five Hispanic men attacked his friend Buddha after he and Buddha had done a "dope rip on them." Fuentes also said he ran from the police because he was on parole. Fuentes did not appear tired and was not sweating or breathing hard. In addition, the only injury officers observed on him was a scratch on his abdomen, which Fuentes said occurred a few days earlier.

DISCUSSION

I

Attempted Robbery Convictions

Fuentes contends we must reverse his attempted robbery conviction for two related reasons: the trial court failed to sua sponte instruct the jury on his claim-of-right defense and, because he was attempting to recover his own money, there was insufficient evidence of felonious intent. We conclude reversal is not required under the circumstances.

A required element of robbery is a felonious taking, or a taking done with the intent to steal another's property. (*People v. Tufunga* (1999) 21 Cal.4th 935, 948 (*Tufunga*)). Ordinarily, a trier of fact may infer the requisite intent from the taking itself, especially if the taking was forceful. (*Id.* at p. 944.) Under the claim-of-right defense, however, the requisite intent is absent and a felonious taking does not occur when "the

defendant is seeking to regain specific property in which he in good faith believes he has a bona fide claim of ownership or title." (*Id.* at pp. 950, 956.)

The claim-of-right defense has significant limits, two of which are pertinent here. The defense does not apply "to forcible takings perpetrated to satisfy, settle or otherwise collect on a debt." (*Tufunga, supra*, 21 Cal.4th at pp. 939, 954, 956.) The defense also does not apply where the basis for claimed right to the property is a transaction generally known to be illegal. (*Id.* at p. 953, fn. 5; *People v. Barnett* (1998) 17 Cal.4th 1044, 1144; *People v. Hendricks* (1988) 44 Cal.3d 635, 642; *People v. Gates* (1987) 43 Cal.3d 1168, 1182, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459; *People v. Johnson* (1991) 233 Cal.App.3d 425, 457.)

In this case, according to Fuentes's own testimony, he attempted to forcibly recoup money he gave Roney to purchase methamphetamine because Roney did not deliver the methamphetamine. Fuentes's actions were, therefore, an effort to settle a debt. In addition, the failed methamphetamine transaction upon which Fuentes based his claimed right to recoup the money was a transaction generally known to be illegal. Moreover, Fuentes knew or should have known the transaction was illegal because of his prior conviction for possessing methamphetamine for sale. Consequently, a claim-of-right defense was not available to Fuentes, precluding the trial court from having a sua sponte duty to instruct the jury on it. (*People v. Barnett, supra*, 17 Cal.4th at pp. 1145-1147 [a trial court is not required to instruct on the claim-of-right defense where the evidence does not support it].)

The fact Fuentes may have initially obtained the money from a legal source does not alter our conclusion. Fuentes voluntarily relinquished the money to Roney to purchase some methamphetamine. It was the failure of the methamphetamine transaction that prompted Fuentes's actions and, in his view, justified them. Thus, contrary to Fuentes's assertion, the basis for his claimed right to recoup the money from Roney was the failed methamphetamine transaction, not the initial source of the money.

Absent the availability of a claim-of-right defense, the jury could reasonably infer the requisite felonious intent from Fuentes's admitted actions. (*Tufunga, supra*, 21 Cal.4th at p. 944 [felonious intent may be inferred from forcible taking].) We, therefore, conclude there was substantial evidence to support Fuentes's conviction for attempted robbery.

II

Improper Dual Use of Prior Conviction

Fuentes's prior conviction for assault by means likely to produce great bodily injury qualified both as a prior prison conviction subject to a one-year sentence enhancement under section 667.5, subdivision (b), and as a prior serious felony conviction subject to a five-year sentence enhancement under section 667, subdivision (a)(1). At the sentencing hearing, as to all four counts, the trial court imposed both the one-year and the five-year enhancement for this prior conviction.

Fuentes contends, the People concede, and we agree the trial court's imposition of both enhancements for the prior conviction was improper under *People v. Jones* (1993) 5 Cal.4th 1142, 1152-1153 (*Jones*). As the California Supreme Court explained in *Jones*,

"when multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply." (*Id.* at p. 1150.)

III

Improper Imposition of Multiple Prior Conviction Enhancements

For Determinate Sentence

The trial court imposed an indeterminate sentence for count 1 and a determinate sentence for counts 2 through 4. For each count of the determinate sentence, the trial court imposed prior conviction enhancements under section 667, subdivision (a)(1), and section 667, subdivision (b). Fuentes contends, the People concede and we agree that the trial court was only permitted to impose the prior conviction enhancements once. As the California Supreme Court has explained, enhancements for prior convictions go to the nature of the offender rather than the nature or circumstances of the offense and have nothing to do with particular counts. (*People v. Tassell* (1984) 36 Cal.3d 77, 90, overruled on another ground by *People v. Ewoldt* (1994) 7 Cal.4th 380, 401.) Thus, for determinate sentences, "enhancements for prior convictions do not attach to particular counts but instead are added just once as the final step in computing the total sentence." (*People v. Tassell, supra*, at p. 90, fn. omitted; *People v. Williams* (2004) 34 Cal.4th 397, 400.)

IV

Modifications to the Abstract of Judgment and the Trial Court's Minutes

Fuentes requests we order several modifications to the abstracts of judgment and the trial court's minutes. Specifically, he requests the abstract of judgment for the indeterminate sentence be modified to reflect his actual sentencing date of July 29, 2010, instead of July 19, 2010. He requests the abstract of judgment for the indeterminate sentence and the court's minutes for July 29, 2010, be modified to reflect a victim restitution amount of \$11,003.25, instead of \$111,003.25.⁴ He requests the appropriate abstract of judgment be modified to include 534 days of presentence custody credit, which the trial court awarded him at the sentencing hearing. Finally, he requests the abstract of judgment for the determinate sentence be modified to reflect the trial court's dismissal of the enhancements under sections 12022.7, subdivision (b), for counts 2 and 3. (See, fn. 2, *ante*.) The People do not object to any of these modifications and we agree each of them is appropriate and necessary.

DISPOSITION

The trial court is directed to strike the one-year sentence enhancements imposed under section 667.5, subdivision (b), for Fuentes's prior conviction for assault by means likely to produce great bodily injury. In addition, the trial court is directed to strike the

⁴ At the sentencing hearing, the trial court ordered Fuentes to pay Roney restitution of \$11,003.25. The trial court anticipated it would likely order an additional \$100,000 in restitution when all of Roney's expenses were totaled. Nothing in the record, however, indicates the trial court subsequently modified its initial restitution order to include the additional \$100,000.

prior conviction sentence enhancements imposed in contravention of *People v. Tassell*, *supra*, 36 Cal.3d at p. 90. The trial court is further directed to modify: (1) the abstract of judgment for the indeterminate sentence to reflect a sentencing date of July 29, 2010; (2) the abstract of judgment for the indeterminate sentence and the court's minutes of July 29, 2010, to reflect a victim restitution amount of \$11,003.25; (3) the appropriate abstract of judgment to reflect the trial court's award of 534 days of presentence custody credit; and (4) the abstract of judgment for the determinate sentence to reflect the trial court's dismissal of the enhancements under sections 12022.7, subdivision (b), for counts 2 and 3. Once the trial court has modified the abstracts of judgment, the trial court is directed to forward copies of the modified abstracts to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

McDONALD, J.

McINTYRE, J.