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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM LEONARD THRASH,

Defendant and Appellant.

E052049

(Super.Ct.No. BLF004730)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Stephen J. Gallon, Judge.

Affirmed.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Steve Oetting, Barry Carlton and Marissa A. Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury found defendant William Leonard Thrash guilty as charged of assaulting two correctional officers, K. Palmer (count 1) and A. Lopez (count 2), by means likely to produce great bodily injury and while serving a state prison sentence. (Pen. Code, § 4501.)¹ The offenses occurred at Ironwood State Prison where defendant was already serving a life sentence.

The trial court found defendant had five out-of-state strike priors from the State of Kentucky in 1973 (§ 667, subd. (d)) and sentenced him to 25 years to life on count 1 and a consecutive 16-month term on count 2. The court denied defendant's *Romero*² motion to strike his strike priors for purposes of count 1, but granted the motion for purposes of count 2.

Defendant appeals, claiming: (1) there is insufficient evidence he used force likely to produce great bodily injury in counts 1 and 2; (2) there is insufficient evidence that he was the person who suffered the five strike priors; and (3) the court abused its discretion in denying his *Romero* motion for purposes of count 1. We find each of these claims without merit and affirm the judgment in its entirety.

II. BACKGROUND

On May 14, 2007, while serving a life sentence as a third striker at Ironwood State Prison, defendant was at the prison medical clinic waiting to see a doctor. Defendant was

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

sitting in a holding cell and was next in line to be seen. He had been attempting to see the doctor for several days.

Around 11:30 a.m., one of the nurses asked defendant to leave the holding cell and return to his unit for a “closed custody count.” Defendant said he was not leaving because he needed medication, and he was concerned that if he left he would not see the doctor that day and get the medication he needed. Defendant repeatedly refused to leave, even after one of the nurses told him she would make sure he would be seen that day.

Four officers responded to the holding cell. Officer Raulston arrived first, followed by Officers Palmer and Lopez, then Sergeant Ross. Before Sergeant Ross arrived, Officer Palmer gave defendant a direct order to leave. Defendant was frustrated, angry, and argumentative. He responded by saying something like, “Fuck you. I ain’t going nowhere,” and “I’m not leaving till I see the fucking doctor.”

For five to ten minutes, Officers Palmer, Lopez, and Raulston tried to convince defendant to leave the holding cell and return to his unit. Finally, after Officer Lopez radioed for Sergeant Ross, defendant got up and said, “Fuck this. I’m outta here. Get outta my way.” He walked out of the holding cell, pushing past Officers Palmer and Lopez.

As defendant reached the locked exit door and tried to open it, Officer Palmer told him to turn around and “cuff up.” Defendant initially ignored the order, then “whirl[ed] around” and punched Officer Palmer in the back of the neck, near the base of his skull, knocking him to the floor. Officer Palmer saw the punch coming and tried to dodge it.

Still, the blow struck him with enough force to briefly disorient him and cause him to “see stars.” He suffered a strained neck and missed three weeks of work on doctor’s orders.

After defendant punched Officer Palmer in the back of the neck, Officer Lopez and Sergeant Ross, who had just arrived through the exit door, grabbed defendant in a “bear hug,” and defendant pulled them to the floor. Officer Raulston then “joined in,” and the struggle with the officers continued on the concrete floor outside the exit door.

Defendant punched Officer Lopez approximately five times, including twice in the side of the face as they dropped to the floor, and at least once in the eye after they fell to the floor. Officer Lopez landed on his elbow on the concrete floor, and suffered a torn rotator cuff and a torn ligament. The injuries required surgery, and Officer Lopez missed 10 months of work.

As the struggle continued on the floor, defendant was thrashing around “wildly,” swinging his arms and legs. Officer Raulston pepper sprayed defendant, and Officer Palmer struck him three times in the legs with a baton—to no effect as defendant continued to violently resist the officers.

Eventually, the officers gained control of defendant and handcuffed him. The entire struggle lasted about 30 seconds—from the time defendant struck Officer Palmer to the time the officers handcuffed him. It is a violation of prison rules for an inmate to disobey a direct order from a correctional officer, and to either touch or swear at a correctional officer.

III. DISCUSSION

A. *Substantial Evidence Shows Defendant Used Force Likely to Produce Great Bodily Injury in Counts 1 and 2*

Defendant claims insufficient evidence supports his convictions in counts 1 and 2 for assaulting Officers Palmer and Lopez, respectively, with force likely to produce great bodily injury. (§ 4501.) He argues that none of his actions during the struggle, including any of the punches he threw, were likely to result in great bodily injury to Officers Palmer or Lopez.

The standard of review is well settled. In considering a claim that there is insufficient evidence supporting a criminal conviction, we examine the entire record in the light most favorable to the judgment in order to determine whether it contains substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could have found the defendant guilty of the offense beyond a reasonable doubt. (*People v. Snow* (2003) 30 Cal.4th 43, 66.)

Like section 245, subdivision (a), section 4501 penalizes the use of force “likely to produce great bodily injury.” The question for the trier of fact is not whether the force used *actually caused* great bodily injury, but whether it was *likely* to cause great bodily injury. (*People v. Russell* (2005) 129 Cal.App.4th 776, 787-788.) Accordingly, the jury was instructed that to find defendant guilty in counts 1 and 2, it had to find he was “aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force [likely to produce great bodily

injury].” (CALCRIM No. 2721.) The jury was further instructed that great bodily injury “means significant or substantial injury. It is an injury that is greater than minor or moderate harm.” (*Ibid.*)

Defendant argues that even if Officers Palmer and Lopez suffered great bodily injury as a result of the struggle, the force he used during the struggle was not likely to cause either of them great bodily injury. More specifically, he claims that none of the officers’ injuries “were the direct result” of any the punches he threw, “but rather the officers’ volitional reaction to his defiance.” Thus, he argues, it was unreasonable for the jury to conclude that the punches he threw “were of such grave significance that they were likely to cause great bodily injury”

Defendant’s argument does not account for the likely consequences of the punches he threw during the struggle or his forcible resistance to the officers under the totality of the circumstances. Defendant’s acts during the struggle must be judged in light of all the attendant circumstances—which included causing Officer Lopez to land on the concrete floor on his elbow, resulting in his torn rotator cuff and torn ligament, and punching Officer Palmer near the base of his skull, a highly sensitive area of the body likely to result in great bodily injury.

In *People v. Russell, supra*, 129 Cal.App.4th at pages 787 and 788, the defendant pushed the victim into a four-lane street where the victim was struck by an oncoming vehicle. In upholding the defendant’s conviction for violating section 245, subdivision (a)(2), the court reasoned it was “not necessarily the amount of force” the defendant used

in pushing the victim, but the “injury-producing potential of the moving automobile” that “suppli[ed] the likelihood of great bodily injury or worse.” (*People v. Russell, supra*, at p. 788.) Here, too, the amount of force defendant used was likely to result in great bodily injury to Officers Palmer and Lopez under the circumstances.

Substantial evidence shows that defendant struck Officer Palmer with a closed fist near the base of the skull, where the brain stem and spinal column connect. Even though Officer Palmer saw the punch coming and tried to avoid it, it knocked him to the floor, briefly disoriented him, and caused him to “see stars.” And even if defendant did not specifically intend to hit Officer Palmer near the base of his skull, when he “whirl[ed] around” and swung at the officer he showed no regard for whether the blow would strike the officer near the base of his skull or another sensitive area likely to result in great bodily injury. In sum, given the force with which the punch was thrown and where it landed, it was likely to have caused a more serious spinal injury. Under these circumstances, the jury reasonably concluded that the amount of force defendant used against Officer Palmer was likely to cause him great bodily injury.

Substantial evidence also shows that the amount of force defendant used was likely to result in great bodily injury to Officer Lopez. After Officer Lopez and Sergeant Ross grabbed him in a bear hug, defendant dropped to the floor, taking the officers with him. During the fall, defendant struck Officer Lopez at least twice in the face with his fist. Unable to protect himself during the fall, Officer Lopez broke his fall to the concrete floor by landing on his elbow, and apparently causing him to suffer a torn rotator cuff and

torn ligament. Indeed, under the circumstances, the jury could have reasonably inferred that defendant's acts of resistance, including his kicking and thrashing around on the floor, could have resulted in great bodily injury to any of the four officers who were trying to restrain him.

B. The Five Out-of-state Prior Strike Convictions Qualified as Strikes Under California Law, and Substantial Evidence Shows Defendant Was the Person Who Suffered Them

Defendant makes two claims concerning his five out-of-state prior strike convictions: (1) insufficient evidence shows he was the person who suffered the convictions; and (2) the convictions do not qualify as prior strikes under California law. Neither claim has merit.

1. Relevant Background

Defendant was originally charged with six out-of state strike priors, all from the State of Kentucky. At the outset of the court trial on the priors, the court granted the prosecution's motion to dismiss the sixth strike prior allegation, and trial proceeded on the other five prior strike allegations.

The prosecution presented certified copies of Kentucky court records showing that a person with defendant's name and date of birth—William Leonard Thrash, born on September 25, 1949—pleaded guilty and was convicted on September 28, 1973, of four counts of armed robbery (counts 1-4) and one count of “malicious shooting without wounding,” involving the personal use of a firearm and intent to kill (count 5). The records showed that the armed robberies occurred on separate dates in April and June

1973. During the fourth armed robbery, the defendant held up the Night Owl Food Mart using a .38-caliber revolver, and fired one shot at a customer as the customer left the store. The shooting at the customer formed the basis of the malicious shooting conviction in count 5.

Additional evidence showed that fingerprints taken from defendant in court during the current proceedings matched a certified copy of a Federal Bureau of Investigation (FBI) fingerprint card, consisting of a set of fingerprints taken from the William Leonard Thrash who suffered the five 1973 Kentucky convictions. The FBI fingerprint card included a notation that the person whose prints were on the card had an artificial right eye. The parties stipulated that defendant did not have an artificial right eye. At the conclusion of the trial, the court found that defendant was the person who suffered the five prior out-of-state strike convictions, and that all five convictions constituted serious felonies and strikes within the meaning of California's "Three Strikes" law.

2. Substantial Evidence Shows Defendant Suffered the Five Prior Convictions

Defendant argues that insufficient evidence supports the court's determination that he was the person who suffered the five strike priors because the "artificial right eye" notation on the FBI fingerprint card meant—or at least raised a reasonable doubt—that someone other than he suffered the five strike priors. We disagree. The court reasonably concluded, based on all of the evidence, that defendant was the person who suffered the prior strike convictions.

The People had the burden of proving beyond a reasonable doubt that defendant was the person who suffered the five prior strike convictions. (*People v. Bueno* (2006) 143 Cal.App.4th 1503, 1507.) In determining defendant was the one who suffered the convictions, the court was entitled to draw reasonable inferences from the certified records offered to prove the convictions. (*People v. Williams* (1996) 50 Cal.App.4th 1405, 1413.) We presume the existence of every fact the court could have reasonably deduced from the evidence. (*People v. Reilly* (1970) 3 Cal.3d 421, 425.)

As indicated, the FBI fingerprint card—consisting of a copy of a set of fingerprints taken from the person who suffered the five Kentucky convictions—included the notation, “right eye missing artificial” indicating that the person whose fingerprints were on the card had an artificial right eye. Defendant did not have an artificial right eye. Nevertheless, the fingerprints on the FBI card were ostensibly taken from a person with the same name and date of birth as defendant—William Leonard Thrash, born on September 25, 1949—and matched the set of fingerprints recently taken from defendant in court.

Because defendant’s name, date of birth, and fingerprints matched the name, date of birth, and fingerprints on the FBI card, the court reasonably concluded that defendant was the person who suffered the five 1973 prior strike convictions—notwithstanding the artificial right eye notation on the FBI fingerprint card. Under the circumstances, the court could have reasonably concluded, and apparently did conclude, that the artificial right eye notation was simply a mistake or clerical error.

3. The Prior Convictions Qualified as Strikes Under California Law

Defendant next claims that insufficient evidence supports the court's determination that the five 1973 Kentucky convictions constituted strikes for purposes of California's Three Strikes law. He argues that the People "did not even attempt to prove the elements of the Kentucky offenses, the mental state required to be found, or the underlying factual basis of the crimes." We disagree.

California's Three Strikes law provides for longer prison sentences for defendants who have previously been convicted of one or more serious or violent felonies. (*People v. Woodell* (1998) 17 Cal.4th 448, 452; § 667.) In determining whether an out-of-state conviction constitutes a serious or violent felony under California law, the court may look to the "entire record of the conviction." (*People v. Woodell, supra*, at pp. 452-453; *People v. Guerrero* (1988) 44 Cal.3d 343, 355.) The entire record of conviction includes all relevant documents in the court file of the prior conviction (*People v. Castellanos* (1990) 219 Cal.App.3d 1163, 1172), but does not include hearsay that does fall under an exception to the hearsay rule or section 969b (*People v. Reed* (1996) 13 Cal.4th 217, 229-230).

The Kentucky records of conviction showed that defendant pleaded guilty in 1973 to four counts of armed robbery and one count of "malicious shooting," and that in each count defendant was charged with personally using a "pistol" or firearm. At the time of the convictions, Kentucky crimes were defined by common law rather than state statutes. (See *Montgomery v. Commonwealth* (Ky.Ct.App. 1961) 346 S.W.2d 479, 480.) The

Kentucky common law defined robbery as the taking of property from the person or immediate presence of another by use of force or fear. (*Id.* at pp. 480-481.) Section 211 contains a substantially identical definition of robbery. Thus, the four armed robberies met the definition of robbery under section 211. Similarly, the malicious shooting conviction was based on defendant's act of shooting at a store customer during one of the armed robberies. Accordingly, the malicious shooting charge and conviction, which defendant admitted by way of his guilty plea, showed that the offense met the definition of assault with a firearm under section 245, subdivision (a)(2).

The crimes of robbery and assault with a firearm constitute serious felonies and strikes under California's Three Strikes law (§§ 667 [prior serious felony convictions constitute strikes], 1192.7, subd. (c)(19) [robbery is a serious felony], 1192.7, subd. (c)(31) [assault with a firearm is a serious felony].) More broadly, *any* felony in which the defendant personally uses a firearm, or personally uses a dangerous or deadly weapon, qualifies as a serious felony and a strike. (§§ 667, 1192.7, subd. (c)(8) [personal use of firearm], 1192.7, subd. (c)(23) [personal use of dangerous or deadly weapon].) Thus here, the trial court properly concluded, based on the Kentucky records of convictions, that four armed robbery convictions and the malicious shooting conviction were strikes under California law. They were strikes because: (1) they met the definition of robbery (§ 211) and assault with a firearm (§ 245, subd. (a)(2)) under California law; and (2) defendant personally used a firearm, or a deadly and dangerous weapon, in committing each felony offense.

C. *The Court Properly Denied Defendant's Romero Motion for Purposes of Count 1*

Lastly, defendant claims the trial court abused its discretion in denying his *Romero* motion to strike his five strike priors for purposes of sentencing him on count 1. The court struck the priors for purposes of count 2, but refused to strike the priors for purposes of count 1, and sentenced defendant to 25 years to life on count 1. We find no abuse of discretion.

We review a trial court's refusal to dismiss or strike a prior strike conviction for an abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) The defendant has the burden of establishing an abuse of discretion. (*Id.* at p. 376.) The trial court will not have abused its discretion unless its sentencing decision "is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.)

As explained in *Romero*, "the Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict courts' discretion in sentencing repeat offenders." (*Romero, supra*, 13 Cal.4th at p. 528.) The trial court's discretion to strike a qualifying strike is therefore guided by "established stringent standards" designed to preserve the legislative intent behind the Three Strikes law. (*People v. Carmony, supra*, 33 Cal.4th at p. 377.) Specifically, "the court . . . must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence

should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

On May 14, 2007, the date he assaulted Officers Palmer and Lopez with force likely to produce great bodily injury (§ 4501), defendant was 57 years old and was already serving a 25-year-to-life sentence. In 1996, he was convicted in Orange County of assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)), and was sentenced to 25 years to life under the Three Strikes law.

Under his 1996 sentence, defendant would have been eligible for parole around 2019, when he was 70 years old. With his current 25-year-to-life sentence on count 1, coupled with his consecutive 16-month sentence on count 2, he will be ineligible for parole until after he is 90 years old.

In 1973, when he was 24 years old, defendant was sentenced to 16 years in prison for his Kentucky strike convictions. It is unclear when defendant was released from prison in Kentucky, but according to his probation report he moved to California in 1993. He suffers from high blood pressure and diabetes, and is on medication for both ailments. He enlisted in the army in 1970 and was honorably discharged in 1972. He obtained his general equivalency diploma in 1981. He is married but does not know the whereabouts of his wife, and he does not appear to have any immediate family available.

Defendant argues that, given his age of 61 at the time of sentencing, the “relative insignificance” of his current assault convictions, his nonstrike 1996 assault conviction, and the remoteness of his prior strike convictions, the trial court abused its discretion in

refusing to strike his strike priors for purposes of count 1. He emphasizes that his current convictions were “not violent in any real respect,” and occurred because he had been trying to see a doctor for days regarding his medication and became frustrated and upset when he was told he was not going to be seen. He admits he “foolishly stormed out” of the medical clinic in disappointment, then engaged the guards in a 30-second struggle, but maintains his actions “did not deserve a death sentence.”

As the People point out, however, a court may not strike a prior strike conviction simply because it is old—without regard to the defendant’s conduct in the interim. (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.) As the trial court explained in refusing to strike the prior strikes for purposes of count 1, defendant’s 1973 convictions involved four separate armed robberies, with multiple victims, and a shooting with intent to kill. And despite his 16-year prison sentence for those crimes, he “picked up another [section] 245 in Orange County in 1996.” Then, while serving a life sentence for the 1996 conviction and strike priors, he sustained two more assault convictions which also involved violence. Based on defendant’s criminal history and current convictions, we cannot say that the trial court’s decision not to strike his prior strikes was irrational or arbitrary. (*People v. Carmony, supra*, 33 Cal.4th at p. 374.)

IV. DISPOSITION

The judgment is affirmed.

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KING
J.

We concur:

RICHLI
Acting P.J.

CODRINGTON
J.