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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.

HOWARD DUPREE GRISSOM,

Defendant and Appellant.

E053053

(Super.Ct.No. RIF10005293)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Thomas Kelly, Judge.

(Retired judge of the Santa Cruz Super. Ct. assigned by the Chief Justice pursuant to art.

VI, § 6 of the Cal. Const.) Affirmed as modified.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Lilia E. Garcia and Quisteen S. Shum, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant and appellant Howard Dupree Grissom of attempted voluntary manslaughter, a lesser included offense of the charged crime of attempted murder. (Pen. Code, §§ 192, subd. (a), 664.)¹ After the jury deadlocked on other counts, defendant pled guilty to a charge of false imprisonment. (§ 236.) In a bifurcated trial, the court found true allegations that defendant sustained two convictions in Nevada that constituted serious and violent felonies for purposes of California's sentencing laws. (§§ 667, subds. (a), (c), (e)(2)(A), 667.5, subd. (a), 1170.12, subd. (c)(2)(A).) Defendant was sentenced to an aggregate term of 41 years to life.

On appeal, defendant contends: (1) there was insufficient evidence to support the trial court's finding that defendant's Nevada convictions qualified as serious felonies under California law; (2) the court erred in imposing two 5-year enhancements under section 667, subdivision (a), because the prior convictions were not brought and tried separately; and (3) the court abused its discretion in refusing to strike the prior convictions pursuant to section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). We agree with defendant's second argument and will modify the judgment to reflect a stay on the second of the two 5-year enhancements. We reject defendant's other arguments and affirm the judgment as modified.

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

II. FACTUAL SUMMARY

Defendant and Jane Doe met each other around May or June 2010 through a mutual friend named Bobby Reyes. Doe was a drug addict; Reyes provided her with drugs. For money, Doe collected cans and bottles for recycling.

On July 27, 2010, at approximately 1:00 a.m., Doe was in the alley behind defendant's apartment organizing cans and bottles for recycling. Defendant walked up to Doe and they began chatting.

Defendant asked Doe if she could get some drugs for him. Doe made a telephone call to get some drugs, but no one answered.

For the next hour or two, defendant helped Doe collect cans and bottles from dumpsters. Then they went to a convenience store to get some food. Defendant told Doe he had some metal scraps in his apartment she could have to recycle. They returned to defendant's apartment complex. Defendant went upstairs while Doe waited in the truck in an alley. A short time later, defendant returned and put some scrap metal in Doe's truck. Defendant got into the passenger seat of the truck and the two talked.

Defendant pulled out a knife. He told Doe he had been paid \$2,000 to kill her because she "snitched on Bobby." He said if he did not kill her, "they were going to kill him."

Defendant told Doe to drive to a certain parking space and, when that proved to be too open to view, directed her to an underground garage.

Doe told defendant she had kids, and pleaded for her life. He told her he was “going to get something out of it,” and would let her go if she cooperated. Defendant pointed the knife at Doe’s chin and told her to pull down her pants and underwear. She complied. Defendant then had sexual intercourse with Doe. He then told her to pull her pants up and give him her jewelry, which she did.

Doe asked defendant if he would let her go. He said if he did, they would kill both of them. Defendant cut her neck and stabbed her in her side, puncturing her liver. Doe got out of the truck and ran away, with defendant chasing and grabbing her. When Doe ran in front of an oncoming car to get help, defendant ran away. Doe then ran to a gas station where an employee called 911.

When defendant was questioned by police (after waiving his *Miranda*² rights), he told them he knew Doe and that they had consensual sex in his apartment on the night of the incident. Later, he and Doe were sitting in her truck when two men appeared with knives. He described one as “Willie,” and the other as “the little guy.” Doe got out of the car and talked with Willie, which indicated to defendant that Doe had set him up to be robbed. The little guy held a knife to defendant’s throat and demanded money. Defendant fought him and grabbed the knife out of the little guy’s hand. Doe and Willie then ran towards them. Defendant stabbed “whoever came in [his] way.” He then dropped the knife and ran to his apartment. He thought he stabbed the little guy. After

² *Miranda v. Arizona* (1966) 384 U.S. 436.

further questioning, however, defendant admitted he had sex with Doe in the truck and that he stabbed Doe “on the side somewhere.”

III. PROCEDURAL SUMMARY

Defendant was charged with: attempted murder (count 1; §§ 664, 187, subd. (a)); kidnapping to commit robbery (count 2; § 209, subd. (b)(1)); rape (count 3; § 261, subd. (a)(2)); and robbery (count 4; § 211). The district attorney further alleged that defendant committed these crimes by personally using a deadly and dangerous weapon (a knife) (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23)), and, as to the attempted murder and robbery counts, that defendant personally inflicted great bodily injury (§§ 1192.7, subd. (c)(8), 12022.7, subd. (a)). Additional sentence enhancement allegations were made as to the charge of rape.

The district attorney also alleged that defendant had been convicted in Nevada of two prior serious offenses for purposes of section 667, subdivision (a), and the “Three Strikes” law. (§§ 667, subds. (c), (e)(2)(A), 1170.12, subd. (c)(2)(A).) The Nevada convictions were for robbery (Nev.Rev.Stat., § 200.380) and conspiracy to commit robbery (*id.*, §§ 199.480, 200.380). The same offenses were alleged as violent felonies for purposes of prison prior allegations under section 667.5, subdivision (a).

On count 1, the jury found defendant not guilty of attempted murder and guilty of the lesser included offense of attempted voluntary manslaughter. It further found true the allegations defendant used a knife and personally inflicted great bodily injury. The jury found defendant not guilty of kidnapping (count 2) and deadlocked on the lesser included

offense of false imprisonment. The jury also deadlocked on the charge of rape (count 3). It found defendant not guilty of robbery (count 4). Defendant subsequently pled guilty to false imprisonment pursuant to a plea bargain, and the court dismissed the rape count in the interests of justice.

Defendant admitted he had been convicted of the alleged prior offenses in Nevada, but reserved the right to argue that the convictions do not qualify as strike offenses under California law. In a bifurcated trial, the court found the allegations true.

At the sentencing hearing, defendant invited the court to exercise its discretion to dismiss the strike allegations pursuant to section 1385 and *Romero*. After hearing argument on the issue, the court denied the request.

Defendant was sentenced to an indeterminate term of 25 years to life on count 1, enhanced by two 5-year sentences for the prior serious felony convictions, and further enhanced by the true findings on the allegations of great bodily injury and personal use of a deadly weapon. He was sentenced to an additional two years pursuant to his plea agreement for false imprisonment, to be served consecutive to the sentence on count 1.

IV. DISCUSSION

A. Trial Court's Findings That Defendant's Nevada Convictions Constitute Strikes

Defendant contends there was insufficient evidence to support the finding that defendant's Nevada convictions for robbery and conspiracy to commit robbery qualified as serious felonies under California's Three Strikes law. In particular, he contends that the record pertaining to the prior Nevada convictions do not establish that he committed

his Nevada robberies with the specific intent that is required to convict someone of robbery in California. We reject this argument. Although the least adjudicated elements of robbery in Nevada do not include the requirement under California law that the accused had the specific intent to deprive his victim of his or her property permanently, such intent is supported by the allegations of the Nevada accusatory pleading and defendant's guilty plea in the prior case.

1. Legal Principles

“For criminal sentencing purposes in this state, the term ‘serious felony’ is a term of art. Severe consequences can follow if a criminal offender, presently convicted of a felony, is found to have suffered a prior conviction for a serious felony. If the present conviction is also for a serious felony, the offender is subject to a five-year enhancement term to be served consecutively to the regular sentence. (§ 667, subd. (a).) Even if an offender's present conviction is not for a serious felony, a prior conviction for a serious felony renders the offender subject to the more severe sentencing provisions of the three strikes law. (§§ 667, subds. (b)-(i), 1170.12.)” (*People v. Warner* (2006) 39 Cal.4th 548, 552.) Attempted voluntary manslaughter, robbery, and conspiracy to commit robbery are statutorily defined as serious felonies. (§ 1192.7, subd. (c)(1), (19), (39) (42).)

A conviction from another state may qualify as a strike under the Three Strikes law if it involves the same conduct as would qualify as a strike in California. (*People v. Woodell* (1998) 17 Cal.4th 448, 453.) In determining such conduct, the trial court is not limited to the least adjudicated elements of the offense; it may look to the entire record of

the prior foreign conviction to determine whether the prior offense involved conduct that satisfies all the elements of the comparable California serious felony offense. (*People v. Riel* (2000) 22 Cal.4th 1153, 1204; *People v. Myers* (1993) 5 Cal.4th 1193, 1201; *People v. Guerrero* (1988) 44 Cal.3d 343, 352.) In doing so, the court may consider the allegations set forth in the accusatory pleading and the defendant's plea of guilty or no contest to those charges. (*People v. Guerrero, supra*, at pp. 345, 355-356; *People v. Harrell* (1989) 207 Cal.App.3d 1439, 1444; *People v. Carr* (1988) 204 Cal.App.3d 774, 778; *People v. Batista* (1988) 201 Cal.App.3d 1288, 1294.)

The prosecution has the burden of proving all elements of an alleged sentence enhancement beyond a reasonable doubt. (*People v. Miles* (2008) 43 Cal.4th 1074, 1082.) "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." (*Id.* at p. 1083.)

2. Evidence of Defendant's Nevada Convictions

In support of the prior serious felony allegations, the prosecution introduced (among other documents): (1) an information filed in district court, Clark County, Nevada; (2) a plea agreement; and (3) a judgment of conviction. The Nevada information alleges that defendant and Herbert J. Jackson, Jr., committed the crimes of conspiracy to commit robbery, a felony, under Nevada Revised Statutes sections 199.480

and 200.380, and robbery, a felony, under Nevada Revised Statutes section 200.380.

These crimes were allegedly committed on or between July 11, 2007 and July 24, 2007.

Under count 1 (conspiracy to commit robbery), it is alleged that defendant and Jackson “did then and there meet with each other and between themselves, and each of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit the crime of robbery, and in furtherance of said conspiracy, Defendants did commit the acts as set forth in Count 2, said acts being incorporated by this reference as though fully set forth herein.”

Under count 2 (robbery), it is alleged that defendant and Jackson “did then and there wilfully, unlawfully, and feloniously take personal property, to-wit: keys and a cell phone, from the person of JOSE GARCIA, the said JOSE GARCIA being 60 years of age, or older, or in his presence, by means of force or violence or fear of injury to, and without the consent and against the will of the said JOSE GARCIA, . . . the Defendants being criminal[ly] liable under one or more of the following principles of criminal liability, to-wit: (1) by directly committing this crime and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by providing counsel and/or encouragement by approaching the said JOSE GARCIA and engaging him in conversation; the Defendants surrounding the said JOSE GARCIA; one Defendant displaying a knife and attempting to stab the said JOSE GARCIA; one Defendant taking said keys and cell phone from JOSE GARCIA; and/or (3) pursuant to a conspiracy to commit this crime, and/or did take personal property, to-wit: car keys and a 1995 Buick,

from the person of PHILEMON YOUNG, the said PHILEMON YOUNG being 60 years of age, or older, or in his presence, by means of force or violence, or fear of injury to, and without the consent and against the will of the said PHILEMON YOUNG; the Defendants being criminally liable under one or more of the following principles of criminal liability, to-wit: (1) by directly committing this crime and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by providing counsel and/or encouragement by the Defendants approaching the said PHILEMON YOUNG and engaging him in conversation; Defendant HERBERT J. JACKSON, aka Herbert J. Jackson, Jr., going to the rear of the said PHILEMON YOUNG and striking him in the back of the head; Defendant HOWARD GRISSOM, aka Howard Dupree Grissom, thereafter taking said car keys and 1995 Buick from PHILEMON YOUNG.”

The plea agreement, signed by defendant, includes the following: “I hereby agree to plead guilty to: COUNT 1 - CONSPIRACY TO COMMIT ROBBERY (Category B Felony – NRS 199.480, 200.380) and COUNT 2 - ROBBERY (Category B Felony - NRS 200.380), as more fully alleged in the charging document”³

3. Analysis

Nevada’s robbery statute defines robbery as “the unlawful taking of personal property from the person of another, or in the person’s presence, against his or her will,

³ The agreement further states, under the heading, “CONSEQUENCES OF THE PLEA”: “I understand that by pleading guilty I admit the facts which support all the elements of the offense(s) to which I now plead as set forth in [the charging document].”

by means of force or violence or fear of injury, immediate or future, to his or her person or property, or the person or property of a member of his or her family, or of anyone in his or her company at the time of the robbery.” (Nev.Rev.Stat., § 200.380.) In *Litteral v. State* (1981) 97 Nev. 503 [634 P.2d 1226], the Nevada Supreme Court interpreted this statute as defining a general intent crime for which “no intent is necessary except the intention of doing the act denounced by the statute.” (*Id.* at p. 1228.) In construing another state’s statutory law, we give “great deference” to the construction of that statute by the state’s highest court. (*Hughes Electronics Corp. v. Citibank Delaware* (2004) 120 Cal.App.4th 251, 264.)

The *Litteral* court explained that, under the common law, robbery required “a specific intent to deprive the victim permanently of his property. ‘Specific intent’ may be defined as an ‘intent to steal’ which is actually a part of the actor’s thought processes, as contrasted to the ‘general intent’ which may be inferred from the voluntary commission of the *actus reus*. [¶] Where, however, the Legislature in defining the crime of robbery speaks of ‘wrongful’ or ‘unlawful’ taking as our Nevada statute provides, it has been held that the statutory definition is more limited than the common law definition and no intent is necessary except the intention of doing the act denounced by the statute.” (*Litteral v. State, supra*, 634 P.2d at pp. 1227-1228, fns. omitted.)

The court agreed with the reasoning in *Traxler v. State* (Okla.Crim.App. 1953) 251 P.2d 815, which construed an Oklahoma statute that defined “robbery as the ‘wrongful taking of personal property . . . by means of force or violence.’” As the

Litteral court explained, the court in *Traxler* “held that although the word ‘felonious’ incorporated all the common law elements of robbery, including specific intent, the words ‘wrongful taking’ did not; all that was required under the statute was a taking by means of force or violence.” (*Litteral v. State, supra*, 634 P.2d at p. 1228.) The *Litteral* court then interpreted the words “unlawful taking” in the Nevada statute “in the same manner as the Oklahoma court interpreted the words ‘wrongful taking’.” (*Ibid.*, fn. omitted.)

In California, robbery is defined as “the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (§ 211.) Thus, in contrast to Nevada’s robbery statute, robbery under California law requires a “felonious taking” of property—that is, a taking of property with the specific intent to deprive the victim of the property permanently. (*People v. McGee* (2006) 38 Cal.4th 682, 688; *People v. Torres* (1995) 33 Cal.App.4th 37, 50; see also 2 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against Property, § 102, p. 143.) Thus, someone who takes personal property from another without the specific intent to deprive the victim of the property permanently, but otherwise satisfies the elements of robbery, could be convicted of robbery under Nevada law, but not under California law. A robbery conviction under

Nevada law, therefore, does not *necessarily* constitute a serious felony for purposes of California law. (*People v. McGee, supra*, at p. 688.)⁴

As explained above, courts are not limited to what is necessarily established by the prior judgment of conviction. (*People v. Guerrero, supra*, 44 Cal.3d at p. 345.) The court may look to the entire record of the foreign conviction, including the allegations in the accusatory pleading and the defendant’s plea of guilty to those charges. (*Id.* at pp. 345, 355; *People v. Harrell, supra*, 207 Cal.App.3d at p. 1444; *People v. Carr, supra*, 204 Cal.App.3d at p. 778.)

Here, the facts disclosed by our record regarding defendant’s Nevada crimes are established by the accusatory pleading and defendant’s guilty plea. Significantly, defendant explicitly pled guilty to each of the charged counts “as more fully alleged in the charging document” (See *People v. Colbert* (1988) 198 Cal.App.3d 924, 930 [facts alleged in the accusatory pleading can be relied on when the defendant was found guilty “as charged in the information”].) The charging document alleges that defendant “did . . . wilfully, unlawfully, and *feloniously* take personal property” from two victims. (Italics added.) Thus, although one can commit robbery in Nevada without taking the victim’s property feloniously—it is enough to do so “unlawfully”—defendant pled guilty

⁴ Defendant notes another difference between California’s and Nevada’s robbery statutes. Unlike in California, robbery in Nevada can be committed by the taking of property by fear of *future* injury to the person or property of *anyone in the company of the victim at the time of the offense*. (Nev.Rev.Stat., § 200.380; *People v. McGee, supra*, 38 Cal.4th at p. 688.) It does not appear, however, that defendant is asserting this difference as a ground for reversal.

to taking the property from his victims feloniously. The trial court can rely on this fact even though it was “not essential to the judgment” in the Nevada case. (See *People v. Smith* (1988) 206 Cal.App.3d 340, 344.) As the *Litteral* court indicates, “felonious,” in the context of robbery, refers to the specific intent to permanently deprive the owner of his or her property.

Because defendant pled guilty to taking (and conspiring to take) the property of others with the specific intent to permanently deprive them of the property (i.e., “feloniously”), the evidence was sufficient to support the court’s finding that the Nevada convictions qualified as serious felonies under California law for purposes of the Three Strikes law and the five-year enhancements under section 667, subdivision (a).

B. Imposition of Two 5-year Enhancements Under Section 667, Subdivision (a)

The trial court imposed two 5-year terms pursuant to section 667, subdivision (a), based on the Nevada convictions. Defendant contends this was error because the Nevada counts were prosecuted together under the same case number. The People agree.

Section 667, subdivision (a) provides, in relevant part: “[A]ny person convicted of a serious felony who previously has been convicted of a serious felony in this state . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges *brought and tried separately*.” (Italics added.)

In *In re Harris* (1989) 49 Cal.3d 131, the California Supreme Court held that the requirement that the charges be “‘brought and tried separately’ demands that the

underlying proceedings must have been formally distinct, from filing to adjudication of guilt.” (*Id.* at p. 136.) In *Harris*, the charges that gave rise to two convictions were initially brought in a single complaint and were the subject of a single preliminary hearing, but were subsequently prosecuted under two separate informations. (*Id.* at p. 134.) The Supreme Court concluded that the defendant was subject to only one 5-year enhancement under section 667 because “the charges in question were not ‘brought . . . separately,’ but were made in a single complaint.” (*Id.* at pp. 136-137.)

Here, defendant’s two Nevada convictions arose from a single, two-count, complaint with one case number. Defendant pled guilty to the two charges in a single plea agreement. Because the two convictions arose from charges that were not brought and tried separately, they can support only one 5-year enhancement under section 667, subdivision (a). The appropriate remedy is to stay the second of the five-year enhancements. (Cal. Rules of Court, rule 4.447; see *People v. Walker* (2006) 139 Cal.App.4th 782, 794, fn. 9; *People v. Lopez* (2004) 119 Cal.App.4th 355, 364 [Fourth Dist., Div. Two].)

C. Denial of Defendant’s *Romero* Motion

Prior to sentencing, defendant invited the court to dismiss the prior strike allegations pursuant to *Romero, supra*, 13 Cal.4th 497. The People opposed the request. After hearing argument from counsel, the court refused to strike the prior conviction allegations, stating: “I think the defendant is very much within the spirit of the three-strikes law. This was a very serious case with a very serious injury. Could have been a

great deal worse had the knife been a bit one direction or another. Certainly life threatening. [¶] And I'm concerned that our case occurred not long after the Las Vegas strikes. And it's not something that's decades in the past, but this is—tells me he didn't learn a whole lot, if anything, from that incarceration encounter. So I think it is clearly within the ambit of the three-strikes law, so the motion is denied.”

On appeal, defendant argues that the court's decision constitutes an abuse of discretion. We disagree.

A court's refusal to dismiss a prior strike conviction is reviewed for an abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) The court will abuse its discretion only if its refusal to dismiss the prior strike “is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 377.) The defendant has the burden of demonstrating that the court's decision was irrational or arbitrary. (*Id.* at p. 376.)

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.) “[T]he 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.)

Defendant’s argument is based in part on the assertion that the prosecution failed to produce sufficient evidence that defendant’s Nevada convictions constituted strikes. However, as discussed above, we reject this argument.

Defendant also asserts the trial court did not give due consideration to his background. He states, for example, that he moved from Compton, California to Las Vegas, Nevada “to get away from the bad influences of his neighborhood,” “suffered from drug addiction,” and “became involved with a bad man in Las Vegas and pleaded guilty to two felony offenses in a single prosecution.” He further contends that the jury’s verdicts indicate that the jury believed his “story” as to what happened, not Doe’s testimony. By finding defendant guilty of only voluntary manslaughter (as a lesser included offense of the charge of murder), he argues, “the jury believed [defendant] acted in the heat of passion with adequate provocation, or felt the need to defend his life.”

Even crediting defendant’s points about his background and his interpretation of the jury’s verdicts, the court could rationally conclude that defendant was within the spirit of the Three Strikes law. The prior crimes were violent robberies committed against victims who were at least 60 years old. One robbery involved an attempted stabbing of the victim with a knife (although it is not clear whether defendant or his accomplice held the knife). In the other, defendant took the victim’s keys and car after his accomplice struck the victim in the back of the head. Significantly, as the trial court noted, defendant

had been out of prison for a short period of time before committing his crimes in this case. The Nevada robberies were committed in July 2007. He was thereafter sentenced to concurrent terms of two to five years in Nevada. If defendant served only the minimum two years in Nevada, he was out of prison for about one year before committing his crimes against Doe. In light of the short amount of time since his release, as well as the serious and violent nature of his prior crimes and the nature of the subject crimes, the court could rationally conclude that defendant was within the ambit of the Three Strikes law. Accordingly, there was no abuse of discretion.

V. DISPOSITION

The judgment is modified such that the second five-year sentence enhancement imposed pursuant to section 667.5, subdivision (a) is stayed. The trial court is directed to prepare a minute order and an amended abstract of judgment reflecting this modification. The trial court is further directed to forward a copy of the minute order reflecting the court's modification of the judgment and the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.