

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL GHERMAN,

Defendant and Appellant.

E055358

(Super.Ct.No. RIF150599)

OPINION

APPEAL from the Superior Court of Riverside County. Mark E. Johnson, Judge.

Affirmed.

Julie Sullwold, 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, A. Natasha Cortina and Sean M. Rodriquez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Daniel Gherman, guilty of (1) placing a booby trap device (former Pen. Code, § 12355, subd. (a)); and (2) maliciously

possessing a false or facsimile bomb (Pen. Code, § 148.1, subd. (d)). Defendant admitted previously suffering a first degree arson conviction in Oregon. (Or. Rev. Stat. § 164.325.) The trial court found the Oregon arson conviction qualified as a California strike (Pen. Code, §§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1)). The trial court sentenced defendant to prison for a term of six years. Defendant contends the trial court erred by finding his Oregon arson conviction met the criteria for a strike offense in California. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. OREGON ARSON STATUTE

In 1992, the Oregon arson statute provided: “(1) A person commits the crime of arson in the first degree if, by starting a fire or causing an explosion, the person intentionally damages: [¶] (a) Protected property of another; (b) Any property, whether the property of the person or the property of another person, and such act recklessly places another person in danger of physical injury or protected property of another in danger of damage; or [¶] (c) Any property, whether the property of the person or the property of another person, and recklessly causes serious physical injury to a firefighter or peace officer acting in the line of duty relating to the fire.”

B. STRIKE PROCEEDINGS

The prosecutor alleged defendant suffered a first degree arson conviction in Oregon in 1992 (Or. Rev. Stat. § 164.325), and that the Oregon conviction qualified as a strike in California. Defendant admitted he suffered the conviction; however, defendant did not admit the conviction qualified as a California strike.

The prosecutor asserted the Oregon conviction was “substantively similar to the elements required for a conviction under Penal Code section 451, subdivision (b),” and therefore, the Oregon conviction should qualify as a strike in California. The prosecutor argued that the Oregon statute “requires more” for an arson conviction than the California statute, because Oregon requires specific intent while California requires general intent.

The trial court explained that arson of a structure is a strike (Pen. Code, § 451, subd. (c)) in California because it is a serious felony (Pen. Code, § 1192.7, subd. (c)(14)). The trial court noted defendant’s arson conviction pertained to a “dwelling house.” As a result, the trial court informed defense counsel that it was tentatively concluding defendant’s Oregon conviction would qualify as a strike because it involved a structure, which is a serious felony in California.

Defense counsel asserted defendant’s Oregon conviction involved arson of defendant’s unoccupied home. Defense counsel argued the conviction should not qualify as strike because the crime involved defendant’s own home, so (1) “[t]here was no violent intent,” and (2) it was not another person’s property. Additionally, defense counsel asserted defendant did not know, when he pled no contest in 1992, that the conviction could qualify as a strike in California so there were ex post facto issues to address.

The trial court said, “[W]hen I do look here, does it contain all the elements of an arson in California, I have to say, yes. [¶] In fact, it even requires a higher standard. They require more in Oregon. I’m going with the record. It says here he did

unlawfully, intentionally damage protected property, to wit, the dwelling house. It says located at 7211 Southeast 85th, Portland, the property of another. Amount of damage greater than \$25,000. It's a strike. I do find it to be a strike. It includes everything under California law.”

DISCUSSION

Defendant contends the trial court erred by finding his Oregon arson conviction qualified as a strike under California law because California arson requires damage to be caused by burning, but defendant's Oregon conviction does not reflect damage caused by burning. We disagree.¹

“The three strikes law imposes enhanced punishment, ‘[n]otwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions’ [Citations.] A prior conviction for purposes of the three strikes law includes ‘[a] conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of [s]ection 667.5 or subdivision (c) of [s]ection 1192.7.’ [Citation.]” (*People v. Laino* (2004) 32 Cal.4th 878, 895.)

¹ In defendant's opening brief, he also asserted the Oregon conviction was not a California strike because of the ignition element. In defendant's reply brief, he concedes the ignition issue. Thus, we do not address defendant's argument concerning the ignition issue.

“If the statutory definition of the crime in the foreign jurisdiction contains all of the necessary elements to meet the California definition, the inquiry ends. If the statutory definition of the crime in the foreign jurisdiction does not contain the necessary elements of the California offense, the court may consider evidence found within the record of the foreign conviction in determining whether the underlying conduct would have constituted a qualifying offense if committed in California, so long as the use of such evidence is not precluded by rules of evidence or other statutory limitation.’ [Citation.] The record of conviction includes the charging documents, the change of plea form, and the abstract of judgment. [Citation.]” (*People v. Self* (2012) 204 Cal.App.4th 1054, 1059.)

When reviewing statutes and interpreting statutory language, if the language of the statute is clear, then “we should not add to or alter it.” (*People v. Towers* (2007) 150 Cal.App.4th 1273, 1277.) The California arson statute provides: “A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property.” (Pen. Code, § 451.) The arson statute does not contain language concerning damage by burning. Rather, the statutory language appears to set forth that the crime may be completed when a person willfully and maliciously sets fire to a structure. Thus, it does not appear damage by burning is required by the plain language of the statute.

Defendant cites *People v. Lee* (1994) 24 Cal.App.4th 1773, 1776 for the proposition that courts have long incorporated a burning requirement into the offense of

arson. For the sake of judicial efficiency, we will assume defendant is correct, as *Lee* provides, “The nature of the burning requirement was defined over a century ago” (*Ibid.*) The Oregon statute includes a requirement of intentionally damaging property; however, the damage can be caused by fire or explosion, so there is not necessarily a burning element in the Oregon statute due to the alternative language concerning explosions. (Or. Rev. Stat. § 164.325.)

Thus, we must look to the record of conviction to determine if the burning requirement is met. The prosecution bears the burden of proving the prior conviction qualifies as a strike beyond a reasonable doubt. We apply the substantial evidence test and view the record in the light most favorable to the trial court’s findings. (*People v. Towers, supra*, 150 Cal.App.4th at p. 1277.)

The Oregon indictment reflects defendant was charged with “starting a fire,” which “intentionally damage[d]” a “dwelling house.” “[T]he amount of damage caused by the above-described conduct was \$25,000 or more.” Defendant pled no contest to the charge of first degree arson. The plea form reflects a “No Contest” plea “will result in a Guilty finding regarding the charge.” Defendant was imprisoned for 16 months and ordered to pay \$28,880.47 in restitution to State Farm Fire & Casualty Co.

Given that the record of conviction reflects defendant started a fire at a dwelling house, which caused over \$25,000 in damage, it can be inferred that the “damage” element of the Oregon arson statute was satisfied by burning rather than an explosion because fires typically cause burning. In other words, there is substantial evidence supporting the finding that defendant’s crime involved some damage by burning

because Oregon’s arson statute requires there be damage and burning is the type of damage usually caused by fire. Accordingly, we conclude the trial court did not err.

Defendant contends the trial court erred because he pled no contest to “damaging” property, but did not specifically plea to burning property. Defendant’s argument is not persuasive because he concedes, “The ignition element of the California statute appears to be met by the language in the indictment ‘starting a fire’.” Since defendant concedes the ignition was fire, rather than an explosive, and the indictment reflects the damage was caused by the alleged act of starting the fire, the only reasonable inference is that at least some damage was caused by burning.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

McKINSTER
Acting P. J.

RICHLI
J.