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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

HAROLD HENDRICKS FAGAN,

Defendant and Appellant.

F060944

(Super. Ct. No. SF013561A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Susan Pochter Stone, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and John G. McLean, for Plaintiff and Respondent.

-ooOoo-

Appellant Harold Hendricks Fagan, a prison inmate, struck a correctional officer and broke his nose. While charges were pending, the court found Fagan incompetent to

stand trial, committed him to the Department of Mental Health and ordered the involuntary administration of antipsychotic medication. Two years later, Fagan was restored to competency and, at trial, a jury found him guilty of misdemeanor assault and felony battery by a prisoner (Pen. Code, §§ 240, 4501.5).¹ The court found true allegations of two prior strike convictions and imposed a term of 25 years to life to be served consecutive to the six-year term he was serving when sentenced. On appeal, Fagan contends the judgment must be reversed because: (1) the involuntary medication order violated his constitutional liberty interest because it was not supported by substantial evidence and failed to specify a medication and (2) there was a strong possibility his defense was impaired by the forced medication. He also contends (3) substantial evidence does not support the finding that his prior conviction of violating section 245, subdivision (a)(1) qualified as a strike. We affirm.

FACTUAL AND PROCEDURAL HISTORY

On March 25, 2006, Fagan was serving a less than life sentence at Wasco State Prison. John Simpson, a correctional lieutenant, opened Fagan's cell door to speak with him about refusing a cellmate. Fagan advanced on Simpson. Simpson extended his arm and directed Fagan to halt. Fagan pushed Simpson's arm aside and struck Simpson in the face. The blow broke Simpson's nose and necessitated surgical repair.

Criminal proceedings were suspended twice in 2007 pursuant to section 1368 and again in March 2008 when Fagan's competency was questioned. In March 2008, the examining doctors reached different conclusions regarding his competency, so the matter was set for hearing and additional doctors were appointed to examine Fagan. During that hearing, Mr. Fagan was removed from the courtroom for disruptive behavior.² At the subsequent competency hearing, counsel submitted the issue on "the report" of Thomas P. Middleton, Ph.D. The court found Fagan was not competent based on Dr. Middleton's

¹ All further statutory references are to the Penal Code.

² As he was removed, he said, "get your f...ing hands off me, f...ing homosexual. Get your f...ing hands off me, bitch."

report of May 27, 2008, and referred the matter to Robert Sincoff, M.D. for a medication recommendation.

Dr. Middleton's report stated he had examined Fagan in 2007 and found him competent. On May 27, 2008, when he attempted to examine him again, Fagan appeared agitated, accusatory, angry and loud. He was "medication noncompliant." He was unable to provide rationale answers to the doctor's questions and "loudly and rigidly" made demands, but was "not able to justify them." A review of his records indicated that Fagan had been in custody since 1991; he had been treated at state hospitals and, at times, would discontinue his medications and "decompensate." Staff considered him a serious security threat. His diagnoses were paranoid schizophrenia, polysubstance dependence and antisocial personality disorder. Progress notes indicated he was "compliant with medication" in December 2007, but had "refused sick call" about once a month since then. Fagan had been prescribed Prozac, Depakote and Geodon on May 21, 2008. The report noted that correctional mental health staff described Fagan as one of the most agitated and chronically aggressive inmates they had seen at the facility. Dr. Middleton concluded that Fagan was not competent to stand trial. He needed ongoing psychiatric treatment. He was a danger to himself and others and, without treatment, he would continue to suffer physical and psychological harm.

Dr. Sincoff's report of June 25, 2008, stated that involuntary psychotropic medication was medically appropriate. Fagan was diagnosed with schizophrenia and needed medication to stabilize symptoms such as delusions. There was no specific medication currently prescribed because Fagan was refusing medication. There was a substantial likelihood that he would be restored to competency if medicated and a substantial likelihood that he could not be restored to competency without medication. Dr. Sincoff was unaware of the past efficacy of antipsychotic medications but, given Fagan's diagnosis and clinical presentation, treatment with antipsychotic medications was indicated. The potential side effects of these medications were drowsiness, dry mouth, constipation, blurry vision, difficulty urinating, muscle stiffness, slowed movements, tremor, restlessness, dizziness, weight gain and abnormal involuntary movements. These

side effects were unlikely to significantly interfere with Fagan's ability to assist in his defense at trial.

At the June 30, 2008, hearing, the court found that involuntary psychotropic medications were medically appropriate for Fagan based on the report of Dr. Sincoff. During the hearing, Fagan ignored the court's admonition not to speak, saying: "I'm not going to take no medication. I need love. That's what I need. I'm a basketball player and an athlete. I don't do drugs. I don't need drugs. [¶] ... [¶] ... Based on my life, I don't need --- ." At that point, the court had him removed from the courtroom. The court committed Fagan to the Department of Mental Health pursuant to sections 1370 and 1370.01 until he was restored to competency, placed him at Patton State Hospital and ordered that "the treatment facility may administer antipsychotic medication to the defendant as prescribed by the treating psychiatrist." (Full capitalization omitted.)

Almost two years later, on June 18, 2010, Fagan was returned to court with a certificate of competency. The accompanying report stated that Fagan was prescribed Lithium Carbonate and Geodon and had been compliant in taking the medications. The report concluded, "Mr. Fagan should continue to take his psychiatric medications after discharge from this facility; it is believed that his failure to take psychiatric medications, which have controlled his mental illness so well at SVPP, is responsible for his regressing to the decompensated state in which he purportedly committed this instance offense. There is a real danger that Mr. Fagan will become a danger to himself or others should this psychiatric medication be discontinued." The same defense attorney who represented Mr. Fagan in 2007 and 2008, represented him in 2010.

A three-day trial took place in August 2010. At trial, there was no mention of Fagan's medication status. The record does not indicate whether the jail psychiatrist prescribed the same medications for him or whether he took them or refused them. Further, Fagan did not testify at trial. The only appearance he made on the record was when he waived his right to a jury trial on the issue of his prior convictions. Fagan presented no evidence. Defense counsel argued the jury should find Fagan not guilty because he believed the prison erred in trying to place another inmate in his cell given his

single-cell status. And, in striking Officer Simpson, he was simply defending himself from the five correctional officers who entered his cell. The jury found Fagan guilty of the lesser offense on count 1 of misdemeanor assault and guilty as charged on count two of battery. He was later sentenced to a term of 25 years to life.

DISCUSSION

I.

INVOLUNTARY MEDICATION OF PRETRIAL DETAINEES

Fagan contends the judgment must be reversed because the order for involuntary antipsychotic medication was not supported by the evidence before the court and there was a strong possibility his defense was impaired by the forced medication. The People respond that Fagan has forfeited review of this claim by failing to raise it in 2008 when effective relief was possible and, in any event, he received a fair trial. On the record before us, we conclude the 2008 order authorizing Fagan’s forced antipsychotic medication failed to meet constitutional and statutory standards. However, Fagan has failed to demonstrate that the error had any effect on his trial.

1. Was the order supported by substantial evidence?

Constitutional Authority

Sell v. United States (2003) 539 U.S. 166 (*Sell*), held that the federal Constitution permits the administration of antipsychotic drugs involuntarily to pretrial detainees to render the detainee competent to stand trial for serious crimes “if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.” (*Id.* at p. 179.)

To override a defendant’s liberty interest in avoiding the unwanted administration of antipsychotic drugs, due process requires the trial court to determine four factors: (1) important governmental interests are at stake; (2) involuntary medication will significantly further those state interests because administration of the drugs is

substantially likely to render the defendant competent to stand trial and is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense; (3) involuntary medication is necessary to further those interests because any alternative, less intrusive treatments are unlikely to achieve substantially the same results; and (4) administration of the drugs is medically appropriate and is in the patient's best medical interest in light of his medical condition. (*Sell, supra*, 539 U.S. at pp. 180-181.)

Statutory Authority

Section 1370, subdivision (a)(2) and section 1370.01, subdivision (a)(2), which were amended in 2004 to track the *Sell* factors, set forth procedures to be followed in ordering involuntary medication of incompetent defendants. Under section 1370, after a defendant has been found to be incompetent, the trial court must determine whether the defendant consents to the administration of antipsychotic medication. (§ 1370, subd. (a)(2)(B)(ii)(III).) If the defendant does not consent, the trial court may authorize the treatment facility to involuntarily administer antipsychotic medication as prescribed by the defendant's treating psychiatrist, if the court determines that the People have charged the defendant with a serious crime; involuntary administration of antipsychotic medication is substantially likely to render the defendant competent to stand trial; the medication is unlikely to have side effects that interfere with the defendant's ability to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a reasonable manner; less intrusive treatments are unlikely to have substantially the same results; and antipsychotic medication is in the patient's best medical interest in light of his medical condition. (§ 1370, subd. (a)(2)(B)(ii)(III), (iii).)

Several courts have found involuntary administration of antipsychotic medication orders unsupported by substantial evidence under the *Sell* and section 1370 criteria. For example, in *People v. O'Dell* (2005) 126 Cal.App.4th 562, 568, the reviewing court found the trial court had failed to consider the facts and special circumstances of O'Dell's

case. It simply listed the crimes with which he was charged and concluded that the prosecution had a right to speedy resolution of the charges. (*Id.* at p. 570.) Further, the state hospital had failed to specify the condition it was proposing to treat or the medication it intended to administer, or to provide any details relating to alternatives. The trial court thus had insufficient evidence with which to evaluate the appropriateness of the medication. (*Id.* at p. 572.) The court held that a request to involuntarily medicate the defendant must identify the medical condition to be treated, the specific medication proposed, the likelihood that it will render defendant competent to stand trial, its side effects, and any alternative, less intrusive treatments. (*Id.* at p. 573.)

Carter v. Superior Court (2006) 141 Cal.App.4th 992 ordered the trial court to vacate its involuntary medication order, holding that the circumstances shown in the record did not meet the strict *Sell* criteria, nor comply with applicable California law. (*Carter, supra*, at p. 1000.) In particular, there was no evidence regarding the actual medication defendant was to receive. The court found that specificity as to the medication to be administered was critical. Without specific information regarding the proposed medications and their possible side effects, there was no evidence to support the psychiatrists' opinions, or the court's conclusions, that involuntarily administering the medication was substantially likely to render the defendant competent to stand trial and would not interfere with his ability to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a reasonable manner. (*Id.* at p. 1004-1005.)

In *People v. McDuffie* (2006) 144 Cal.App.4th 880, 887, the court reversed a forced medication order finding no substantial evidence that administration of the drugs was "substantially likely" to render the defendant competent to stand trial. The evidence showed, at best, defendant had a 50 to 60 percent chance of "improving" if treated with the recommended psychotropic drugs, and probably less due to history of not responding well to treatment.

Finally, in *People v. Christiana* (2010) 190 Cal.App.4th 1040, the court reversed an order authorizing the involuntary administration of antipsychotic drugs that was not supported by substantial evidence. The evidence was insufficient to establish the medication was both substantially likely to render the defendant competent to stand trial and substantially unlikely to have side effects that would interfere with the defendant's ability to assist counsel in conducting the defense. (*Id.* at pp. 1050-1051.) Two psychiatrists testified only about antipsychotic drugs as a class, without identifying what drugs would likely be used to treat defendant. Their testimonies about potential side effects were similarly generic. Because the medical experts failed to identify the specific antipsychotic medications the defendant should be given, there was no evidence before the court from which it could determine that involuntary administration of drugs was medically appropriate and in the defendant's best interests. (*Id.* at p. 1052.)

Although the trial court arguably made the statutory findings necessary for an involuntary medication order, Dr. Sincoff's half-page medication recommendation is too generic to constitute substantial evidence to support those findings. Among other failings, he did not identify a specific medication that would likely be used to treat Fagan, and he listed the side effects for antipsychotic medication in general. As such, if Fagan had challenged the sufficiency of the order when made, that order could have been remanded for the more detailed showing required under *Sell* and section 1370. However, an order requiring forced medication cannot be undone several years later on appeal from the final judgment. (*Sell, supra*, 539 U.S. at pp. 176-177.) Accordingly, there is no effective relief we can provide for this error at this time.

The consequential question before us is whether the involuntary administration of medication in 2008 deprived Fagan of a fair trial in 2010.

2. Did the forced medication impair Fagan's defense?

Fagan contends the unsupported 2008 involuntary medication order requires his convictions be reversed under *Riggins v. Nevada* (1992) 504 U.S. 127 (*Riggins*).³ He submits, "*Riggins* does not require a showing of the actual consequences and establishes that a judgment should be overturned because of 'a strong possibility' that the defendant's defense was impaired due to the administration of a medication." (Italics omitted.)

In *Riggins, supra*, 504 U.S. 127, the United States Supreme Court held that a defendant may challenge a forced medication order in the appeal from his conviction. Riggins was charged with robbery and murder. While awaiting trial, he told a psychiatrist he was hearing voices and the psychiatrist prescribed an antipsychotic drug. (*Id.* at p. 129.) Before trial, the defense asked the court to suspend administration of the medication Riggins was taking. At a hearing on the motion, two psychiatrists testified that, without medication, Riggins would remain competent to stand trial and his demeanor would not change noticeably. A third psychiatrist testified the medication made Riggins calmer, but he could not predict how he would react if taken off the medication. A fourth psychiatrist testified Riggins was incompetent to stand trial even while taking the medication and predicted that, without medication, his condition would deteriorate. The trial court denied the motion. (*Id.* at pp. 130-131.) At trial, Riggins testified and presented an insanity defense. He was convicted and sentenced to death. (*Id.* at p. 131.)

The Supreme Court held that involuntary administration of the antipsychotic drug denied Riggins due process of law. The state failed to establish the medical

³ Appellate counsel cites more often to the concurring opinion of Justice Kennedy and the dissenting opinion of Justice Thomas (joined by Justice Scalia), which contain broader language than the majority opinion, which this opinion cites.

appropriateness of the drug and that it was required for Riggins's own safety or the safety of others. (*Riggins, supra*, 504 U.S. at p. 135.) The state also failed to establish that it could not obtain an adjudication of Riggins's guilt or innocence by using less intrusive means. (*Id.* at pp. 135-136.) Instead, the trial court simply weighed the risk that the defense would be prejudiced by changes in Riggins's outward appearance against the chance that he would become incompetent if taken off the medication and struck the balance in favor of involuntary medication. (*Id.* at p. 136.)

The court held that the error may well have impaired Riggins's constitutionally protected trial rights. At the pretrial hearing to consider terminating medication, one physician suggested that Riggins's high dosage was within the toxic range and could make him "uptight." Another testified that the dosage might cause drowsiness or confusion. A third expert opined that the sedation-like effect of antipsychotic medication may be severe enough to affect thought processes. (*Riggins, supra*, 504 U.S. at p. 137.) The court concluded it was "clearly possible" that such side effects had an impact on Riggins's outward appearance, the content of his testimony on direct or cross-examination, his ability to comprehend the proceedings, and the substance of his communication with counsel. Further, efforts to prove or disprove actual prejudice from the record were futile. (*Ibid.*) While the precise consequences of forcing antipsychotic medication on Riggins could not be shown from the trial transcript, the doctors' testimony established the strong possibility that Riggins's defense was impaired due to the administration of the drug. (*Ibid.*)

Fagan's situation is distinguishable. First, Fagan's record does not disclose whether the jail psychiatrist continued Fagan on antipsychotic medication during the trial as recommended by the mental health department. Fagan contends the 2008 involuntary medication order remained in effect during trial because the record does not indicate the order was vacated before trial. He reasons, "[t]he plain language of Penal Code section 1370 verily contemplates that any order of involuntary medications issued pursuant to

that code section continues in force during a defendant’s trial since it requires the evidence before the court to address the concern that the medications might interfere with appellant’s abilities during trial....”

We disagree. Section 1370 addresses procedures after a criminal defendant is found to be incompetent and is committed to a mental health facility for restoration of mental competence. In relevant part, it provides that the court must determine whether the defendant consents to the administration of antipsychotic medication. (§ 1370, subd. (a)(2)(B).) If the defendant does not consent, the court must determine whether any of the following is true: (1) the defendant is a danger to himself (§ 1370, subd. (a)(2)(B)(ii)(I)), (2) the defendant is a danger to others (§ 1370, subd. (a)(2)(B)(ii)(II)),⁴ or (3) the defendant is charged with a serious crime and involuntary administration of antipsychotic medication is substantially likely to render him competent to stand trial and the medication is unlikely to have side effects that interfere with his ability to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a reasonable manner. (§ 1370, subd. (a)(2)(B)(ii)(III).) The statute continues, “If the court finds any of [those] conditions ... to be true, the court shall issue an order authorizing the *treatment facility* to involuntarily administer antipsychotic medication ...as prescribed by the ... treating psychiatrist....” (§ 1370, subd. (a)(2)(B)(iii), italics added.)

Fagan’s interpretation does not withstand scrutiny. That the court must consider how forced medication may impact the incompetent defendant’s abilities during trial, does not mean the order continues to authorize forced medication once the defendant is restored to competency and returned to a county jail. Mirroring the words of the statute,

⁴ Dr. Middleton’s report opined that Fagan was a danger to himself and others. However, it is not clear whether the court considered this report in ordering the forced medication nor did the court address those grounds in authorizing forced medication.

the June 30, 2008, order that authorized Fagan's forced medication provided the "treatment facility," (full capitalization omitted) Patton State Hospital, "may administer antipsychotic medications ... as prescribed by the treating psychiatrist." (Full capitalization omitted.) Thus, on its face, the order did not apply when Fagan was restored to competency and returned to the Kern County Superior Court.

Fagan's case is also distinguishable from Riggins's in that Fagan's record does not disclose how medication might have affected Fagan's right to a fair trial. Unlike the testimony of the doctors regarding Riggins's potentially impaired state given his high medication dose (*Riggins, supra*, 504 U.S. at p. 137), there was no testimony regarding what drugs, if any, Fagan was taking during trial, their dosage, or their possible side effects.⁵ Further, the only evidence in the record remotely related to Fagan's trial demeanor is the May 18, 2010, assessment of the psychologist attached to the certification of mental competency.⁶ The report notes that Fagan answered questions on matters of importance in the courtroom in a "very competent manner." Fagan's speech was rather slow, but within normal limits. He denied any unusual thought disturbances

⁵ Fagan cites Justice Kennedy's concurring opinion in *Riggins, supra*, 504 U.S. at pages 142-144, to support his claim that this court must infer prejudice at trial because antipsychotic drugs may alter demeanor in a way that will prejudice all facets of the defense. However, subsequent case law has recognized that significant improvements have been made in antipsychotic medication in the decades since Justice Kennedy expressed his misgivings in *Riggins*. The American Psychiatric Association has pointed out that a new generation of antipsychotic drugs post-dating *Riggins* have appeared. The new drugs, called atypicals, generally are equally or more effective, yet have "a more favorable side effect profile." Most of the atypicals present relatively low risks of the serious side effects associated with the drug at issue in *Riggins*. (*United States v. Gomes* (2d Cir. 2002) 289 F.3d 71, 83; and see *United States v. Gomes* (2d Cir. 2004) 387 F.3d 157, 162 [the atypical drugs would reduce or eliminate Gomes's delusions so that he can better communicate, and the side effects--sedation, dryness of the mouth, constipation and diarrhea--would likely subside within three to four days after treatment begins].) The psychiatrist at Patton State Hospital prescribed an atypical drug, Geodon, for Mr. Fagan.

⁶ The trial occurred August 9-12, 2010.

and his thought process was linear, well directed and generally within normal limits. His attention and concentration were unimpaired and he had fair to good recent and remote memory. He denied hallucinations or other unusual psychiatric phenomena and his judgment had been good of late. He had fair to good insight into his condition and answered questions about courtroom process in a very competent manner. He was well motivated to assist himself at trial and had a rational understanding of the potential outcomes. He had the rationality to assist his attorney.

Finally, the record in this case is silent as to whether there is “a strong possibility” that Fagan’s defense was impaired due to the administration of drugs. In *Riggins*, four psychiatrists testified to various side effects that Riggins may have displayed because of the very high dose of medication he was taking. (*Riggins, supra*, 504 U.S. at p. 137.) To make matters worse, Riggins presented an insanity defense and testified on his own behalf. (*Id.* at p. 131.) In contrast, there was no evidence regarding Fagan’s demeanor, he did not present an insanity defense and he did not testify.

This case is more analogous to *People v. Jones* (1997) 15 Cal.4th 119 (*Jones*), where the California Supreme Court rejected Jones’s claim that he was denied due process because antipsychotic drugs were administered to him to control his schizophrenia during the course of his criminal proceedings. Jones was charged with capital murder and was twice found competent to stand trial (§ 1368). Jones’s counsel did not move the trial court to suspend the administration of Jones’s medication, or otherwise assert that Jones was being medicated against his will. To the contrary, defense counsel stated, regarding the administration of Jones’s medication by jail personnel: “I recognize the jail is doing the best they can, and, I mean, I will encourage any efforts to improve [defendant’s] condition, but my belief is the condition he is in

right now is probably the best that we have got.”⁷ (*Jones, supra*, 15 Cal.4th at p. 152.) Thus, Jones could not raise, for the first time on appeal, the claim that he was denied due process of law because antipsychotic drugs were administered to him to control his schizophrenia during trial. (*Id.* at pp. 152-153.)

The court continued, even if it were to consider the merits of Jones’s contention, *Riggins* did not apply because Jones did not refuse the medication and was not forced to take the antipsychotic drug. Jones argued that nearly three years prior to trial, he refused medication for a brief period and was medicated against his will. As a result, his subsequent compliance in taking medication must be deemed involuntary. (*Jones, supra*, 15 Cal.4th at p. 153.) The record did not support that argument. The record showed that Jones refused medication during the first six months following his arrest. During this period, jail officials forcibly medicated him only when it appeared he had become a danger to himself or others. After he was medicated forcibly a second time, he consented to continue his medication and did so for several years, until he concluded that a change in his medication was causing an unpleasant side effect. However, he consented to resume treatment when his medication was changed at his request prior to trial. (*Id.* at pp. 153-154.) The fact that nearly three years prior to trial, he refused medication for a brief period and was medicated against his will did not render his subsequent compliance in taking medication involuntary. (*Id.* at p. 155-156; see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1361 [trial court, on learning defendant was taking antipsychotic medication, was not required on its own motion to determine whether he was taking the medicine voluntarily and whether there were side effects. The duty to inquire imposed by *Riggins* applied only when the defendant has moved to terminate involuntary medication].)

⁷ The comment was made after defense counsel repeatedly noted that Jones appeared to be sleeping during the trial.

Fagan's situation is similar. He argues that because he objected to the administration of the antipsychotic drugs at the June 30, 2008, hearing, while he was incompetent, we must conclude he continued to object to antipsychotic medication once he was restored to competency and returned to the trial court. The record does not support that claim. Fagan's counsel, who provided a vigorous defense, did not move the court to suspend the administration of his medications, assuming the jail psychiatrist continued to prescribe medications, or otherwise assert that Fagan was being medicated during trial against his will. If anything, the record supports the conclusion that, when competent, Fagan recognized his need for medication and took it voluntarily. He told the psychologist who assessed his restored competency that he was taken off his medication before his altercation with Officer Simpson and he did not believe he would have been assaultive if he was taking his medication. The psychologist also reported that Fagan had been compliant in taking the medications at Patton State Hospital. Further, in contrast to Jones's trial demeanor, there was no indication in the record that Fagan was behaving in any unusual way such as dozing or fidgeting.

Accordingly, Fagan has not established any possibility, let alone a "strong possibility," that his defense was impaired due to the administration of antipsychotic drugs. (*Riggins, supra*, 504 U.S. at p. 137.)

II.

PROOF THAT THE PRIOR ASSAULT WAS A "SERIOUS FELONY"

To prove the prior strike allegations, the prosecutor presented the court with a section 969b packet containing certified copies of an abstract of judgment dated February 27, 2001, for the prior strike offenses. The abstract of judgment showed that Fagan was convicted of a violation of section 245, subdivision (c) "ASSAULT WITH A DEADLY WEAPON," which the parties agree qualified as a serious felony. It also showed he was convicted of a violation of section 245 subdivision (a)(1) (section 245(a)(1)), "ASSAULT WITH A DEADLY WEAPON AND BY MEANS OF FORCE LIKELY TO PRODUCE

GREAT BODILY INJURY,” which Fagan now argues was insufficient to qualify as a serious felony within the meaning of the Three Strikes law.

The trial court found both convictions qualified as a prior serious or violent felony within the meaning of section 667, subdivisions (c) through (j) and section 1170.12, subdivisions (a) through (e) and sentenced Fagan accordingly.

Section 245(a)(1) punishes assault committed either by means likely to produce great bodily injury or by use of a deadly weapon other than a firearm. Only the latter version qualifies as a serious felony within the meaning of the Three Strikes law (§ 1192.7, subd. (c)(31)). (*People v. Delgado* (2008) 43 Cal.4th 1059, 1063 (*Delgado*).)

If a prior conviction offense can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, the court must presume the conviction was for the least serious form of the offense. (*Delgado, supra*, 43 Cal.4th at p. 1066.) If the statute under which the prior conviction occurred could be violated in a way that did not qualify for the alleged enhancement, the evidence is insufficient to establish that the prior conviction qualified for the enhancement. (*Ibid.*)

On review, we examine the record in the light most favorable to the judgment to determine whether a rational trier of fact could have found the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt. (*Delgado, supra*, 43 Cal.4th at p. 1067.)

A document referring simply to a violation of section 245(a)(1) does not provide substantial evidence that the prior assault constitutes a serious felony. There must be additional evidence that the assault involved a deadly weapon and was not simply an assault by means of force likely to produce great bodily injury. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 261-262 (*Rodriguez*).) Further, an abstract of judgment that contains ambiguous references to both prongs of the statute is insufficient evidence of a serious felony. (*Delgado, supra*, 43 Cal.4th at p. 1067.)

Certain clerical notations on the abstract of judgment have been deemed too ambiguous to constitute substantial evidence that the prior assault qualified as a serious felony. For example, ““ASLT GBI/DLY WPN”” (*Rodriguez, supra*, 17 Cal.4th at pp. 261-262) and ““ASSAULT GBI W/DEADLY WEAPON,”” (*People v. Banuelos* (2005) 130 Cal.App.4th 601, 605-606 (*Banuelos*)) were held insufficient to establish that the offense qualified as a serious felony under the Three Strikes law.

In contrast, in *Delgado, supra*, 43 Cal.4th at page 1069, the Supreme Court found the description, ““Asslt w DWpn,”” sufficient. The court noted that in *Rodriguez* and *Banuelos*, the notations on the abstracts of judgment referred to both the deadly weapon and GBI prongs of section 245(a)(1) “in a manner that left unclear whether one, the other, or both, of the statutory forms of offense underlay the conviction.” (*Delgado, supra*, at p. 1070, fn. 4.) However, the description ““Asslt w DWpn”” tracked just one of the disjunctive forms of aggravated assault and thus was substantial evidence the prior assault qualified as a serious felony. (*Id.* at pp. 1069, 1070.)

Fagan argues that because his abstract refers to both prongs of section 245(a)(1) it too is ambiguous and may simply be a reference to the statute itself. The clerical notation at issue, however, does not track the statute. If it did, it would read, “assault with a deadly weapon *or* by means of force likely to produce great bodily injury.” Rather, the use of the conjunctive “and” reflects more than the statutory language. The conjunctive specifies that Fagan’s prior conviction involved violations of both forms of the statute and thus qualified as a serious felony. Fagan asserts there is no crime that requires both prongs as elements. He is correct, but that does not negate the fact that conduct that constitutes a violation of section 245(a)(1) may violate both forms of the statute. That is apparently what happened in this case.

The abstract of judgment is not ambiguous as far as it shows that Fagan’s conviction included assault with a deadly weapon. That his conviction also included assault likely to commit great bodily harm is irrelevant. Accordingly, there is sufficient

evidence to sustain the court's finding that Fagan's 2001 prior conviction under section 245(a)(1) was a strike within the meaning of the Three Strikes law.

DISPOSITION

The judgment is affirmed.

Franson, J.

WE CONCUR:

Dawson, Acting P.J.

Kane, J.