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

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW GILBERT CANTU,

Defendant and Appellant.

F062379

(Super. Ct. Nos. BF132737A &  
BF134797A)

**OPINION**

**THE COURT**\*

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Rudy Kraft, 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, Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

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\*Before Levy, Acting P.J., Cornell, J., and Kane, J.

## FACTS AND PROCEEDINGS

### *Case No. BF132737A*

On June 29, 2010, a criminal complaint was filed alleging that appellant, Andrew Gilbert Cantu, feloniously discharged a firearm in a grossly negligent manner (Pen. Code, § 246.3, subd. (a), count one),<sup>1</sup> committed two criminal threats (§ 422, counts two & three), and resisted arrest, a misdemeanor (§ 148, subd. (a)(1), count six).<sup>2</sup> Counts two and three further alleged that those offenses were serious felonies within the meaning of section 1192.7, subdivision (c) and further alleged gun use enhancements (§ 12022.5, subd. (a)) for those counts.

On August 23, 2010, the date scheduled for a preliminary hearing, appellant entered into a plea agreement in which he would admit counts one and six and be placed on felony probation in exchange for the dismissal of the other allegations. Appellant executed a felony plea form acknowledging and waiving his constitutional rights pursuant to *Boykin/Tahl*.<sup>3</sup> When the trial court accepted appellant's change of plea, the court had the following colloquy with appellant and with counsel:

“THE COURT: People versus Andrew Cantu. Mr. Cantu is present with Ms. Watts, Ms. Organ-Bowles is here for the People. This is on for a pre-preliminary hearing.

“Mr. Cantu, it's been indicated to me that you are going to plead guilty or no contest to count one, reckless discharge of a firearm, and also misdemeanor count six, Penal Code 148(a)(1), and you would receive a year in jail as a condition of felony probation. Is that what you understood and agreed to?

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<sup>1</sup> Unless designated otherwise, all statutory references are to the Penal Code.

<sup>2</sup> The complaint alleged three additional misdemeanor offenses.

<sup>3</sup> *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.

“THE DEFENDANT: Yes, ma’am.

“THE COURT: Count one, the reckless discharge of a firearm, is considered to be a serious felony, so it will be a strike on your record. Do you understand that?

“THE DEFENDANT: Yes, ma’am.

“THE COURT: Did you get a chance to talk with your attorney about that?

“THE DEFENDANT: Yes, ma’am.

“THE COURT: Do you understand the consequences of having a strike on your record?

“THE DEFENDANT: Yes, ma’am.

“THE COURT: Do you understand in the future, if you are convicted of another felony, this will be considered a strike prior and it will increase the punishment in a future conviction?

“THE DEFENDANT: Yes, ma’am.

“THE COURT: Do you have any questions about that?

“THE DEFENDANT: No, ma’am.

“THE COURT: Sir, I have your waiver of rights form, did you initial and sign this?

“THE DEFENDANT: Yes, ma’am.

“THE COURT: Did you go through these rights with your attorney?

“THE DEFENDANT: Yes, ma’am.

“THE COURT: Do you understand these rights?

“THE DEFENDANT: Yes, ma’am.

“THE COURT: Do you have any questions about them?

“THE DEFENDANT: No, ma’am.

“THE COURT: Do you give up these rights?

“THE DEFENDANT: Yes, ma’am.

“THE COURT: Do you join that waiver, Ms. Watts?

“MS. WATTS: Yes.

“THE COURT: Will you waive a formal reading of the complaint?

“MS. WATTS: So waived.

“THE COURT: Will you stipulate to a factual basis for the plea, based on the police report?

“MS. WATTS: So stipulated.

“MS. ORGAN-BOWLES: Joined.

“THE COURT: I’ll make a finding there’s a factual basis for the plea.

“Sir, do you have any questions about anything at all, before I take your plea?

“THE DEFENDANT: No, ma’am.

“THE COURT: Sir, count one alleges that on or about June 24th, 2010, you did willfully, unlawfully, discharge a firearm in a grossly negligent manner, which could result in injury or death to a person, that’s a violation of Penal Code section 246.3(a), a serious felony; how do you plead to that charge?

“THE DEFENDANT: No contest.

“THE COURT: I’ll accept the no-contest plea, make a finding of guilt.”

On September 21, 2010, the trial court sentenced appellant to felony probation.

***Case No. BF134797A***

On January 4, 2011, an information was filed alleging that appellant feloniously made criminal threats (§ 422, counts one & two). The information alleged that both counts were serious felonies pursuant to section 1192.7 and that appellant had a prior serious felony conviction within the meaning of the three strikes law for his conviction for section 246.3.

On March 2, 2011, the parties entered into a plea agreement. Under the agreement, appellant would challenge whether his conviction for section 246.3

constituted a strike. The court explained that it would give appellant the two-year midterm for the new violation of section 422 and double the sentence if it found the conviction for section 246.3 to be a strike. Appellant could argue that the section 246.3 conviction was not a strike. The court indicated that if appellant was denied review of this issue, the court would permit him to withdraw his plea.

Appellant executed a plea form acknowledging the terms of the agreement, his constitutional rights, and waiving those rights. The parties stipulated to a factual basis for the change of plea and appellant admitted one count of section 422. Appellant also admitted the prior conviction alleged as a strike, but not that the prior conviction was a strike.

The court conducted two hearings to determine whether appellant's conviction for section 246.3 constituted a serious felony and could be used as a strike. At the first hearing, the court relied on the probation officer's report and found that appellant did admit that he committed a serious felony.<sup>4</sup> After reviewing authorities submitted by defense counsel, however, the court found that it could not rely on the probation report and reconsidered appellant's motion on April 27, 2011. The court found that under all the circumstances, the prior conviction could be treated as a strike.

The court sentenced appellant to a term of two years, doubled to four years, for his conviction of section 422 in case No. BF134797A and to a concurrent term of two years for appellant's conviction in case No. BF132737A. In case No. BF132737A, the court awarded 250 days of custody credits and 124 days of conduct credits. In case No. BF134797A, the court awarded 146 days of custody credits and 72 days of conduct credits. Appellant filed a timely notice of appeal. Thereafter, appellant successfully

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<sup>4</sup> The court could have relied on the police reports because the parties stipulated that these reports constituted the factual basis for appellant's no contest plea to section 246.3.

sought leave of this court and obtained a certificate of probable cause from the trial court. Appellant contends that the trial court erred in ruling that his conviction of section 246.3 constituted a serious felony that could be used as a strike. Appellant asserts, and respondent concedes, that he is entitled to additional custody credits.

### **PRIOR SERIOUS FELONY**

Appellant contends he never admitted that he used a gun and the trial court erred in finding his conviction for section 246.3 was a serious felony. We disagree and affirm the trial court's ruling.

In order for a prior conviction to qualify as a strike, it must be proven that it includes all the elements of a felony described in either section 667.5, subdivision (c), as a violent felony, or section 1192.7, subdivision (c), as a serious felony. (§ 667, subd. (d)(1); *People v. Rodriguez* (1998) 17 Cal.4th 253, 261 (*Rodriguez*)). Section 246.3 is not included in the statutory provisions of section 667.5. Nor is it included in the list of serious felonies set forth in section 1192.7, subdivision (c). Further, section 1192.7, subdivision (c)(8), provides that "serious felony" means "any felony in which the defendant personally ... uses a firearm."

Section 246.3 provides: "Except as otherwise authorized by law, any person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a public offense ...." Section 246.3 was enacted to deter the dangerous practice of discharging firearms into the air during festive occasions. (*People v. Clem* (2000) 78 Cal.App.4th 346, 350.) The elements of the offense are: 1) to unlawfully discharge a firearm; 2) to do so intentionally; and 3) to do so in a grossly negligent manner which could result in the injury or death of a person. (*Ibid.*) To be convicted of violating section 246.3, it must appear that the defendant's act "actually had the potential for culminating in personal injury or death." (*People v. Alonzo* (1993) 13 Cal.App.4th 535, 539.)

The question of whether a violation of section 246.3 necessarily includes personal use of a firearm is unclear. As noted by the court in *People v. Bartow* (1996) 46 Cal.App.4th 1573 (*Bartow*), the definition of section 246.3 does not explicitly contain a “personal use” element. Appellant contends, and respondent concedes, that the discharge of a firearm in a grossly negligent manner, in violation of section 246.3, is not defined as a serious felony, and that this offense only qualifies as a strike if the defendant personally used the firearm. (*People v. Leslie* (1996) 47 Cal.App.4th 198, 201-203 (*Leslie*); §§ 667, subd. (d)(1) & 1192.7, subd. (c)(8).) An aider and abettor who did not personally use a firearm may be convicted of violating section 246.3, but that offense would not constitute a serious felony since the defendant did not personally use a firearm. (*People v. Golde* (2008) 163 Cal.App.4th 101, 112; *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1531; *Bartow, supra*, 46 Cal.App.4th at pp. 1576-1577, 1582-1583.) Accordingly, where the prior conviction is for an offense that can be committed in different ways, and the record does not disclose how the offense was committed, we must presume the conviction was for the least serious form of the offense. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1066; *Rodriguez, supra*, 17 Cal.4th at p. 262; *People v. Self* (2012) 204 Cal.App.4th 1054, 1059.)

Assuming that personal use must be proven to find the prior conviction allegation true under the three strikes law, the next question is whether there was sufficient evidence presented here to do so.<sup>5</sup> To determine the truth of a prior conviction, “the trier of fact

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<sup>5</sup> The parties cite *People v. Trujillo* (2006) 40 Cal.4th 165, 179, for the proposition that a finder of fact may not go beyond the record of conviction by using a defendant’s admissions in a probation report. The Supreme Court specifically concluded: “[A] defendant’s statements, made after a defendant’s plea of guilty has been accepted, that appear in a probation officer’s report prepared after the guilty plea has been accepted are not part of the record of the prior conviction.” (*Ibid.*) That is because such statements do not reflect the facts of the offense for which the defendant was convicted. (*Ibid.*) We therefore do not rely on the facts set forth in the probation officer’s report in our analysis.

may look to the entire record of the conviction.” (*People v. Guerrero* (1988) 44 Cal.3d 343, 355 (*Guerrero*); *People v. Thoma* (2007) 150 Cal.App.4th 1096, 1101; *People v. Gonzales* (2005) 131 Cal.App.4th 767, 773.) The record of conviction can be comprised of the information and verdict forms (*People v. Skeirik* (1991) 229 Cal.App.3d 444, 462); preliminary hearing transcripts (*People v. Castellanos* (1990) 219 Cal.App.3d 1163, 1172); abstracts of judgment (*People v. Johnson* (1989) 208 Cal.App.3d 19, 26); minute orders (*People v. Harrell* (1989) 207 Cal.App.3d 1439, 1444); or change of plea forms (*People v. Carr* (1988) 204 Cal.App.3d 774, 778).

Here, the evidence consisted of the criminal complaint, the transcript of the plea hearing, and a written change of plea form. Appellant argues that these documents do not make any reference to his personal use of a firearm during the commission of the offense. Although *Guerrero, supra*, 44 Cal.3d at page 355, did not define what it meant by the term “entire record of the conviction,” subsequent case law has defined that term to include anything which was filed in or lodged with the superior court and any transcripts of superior court proceedings. (See *People v. Abarca* (1991) 233 Cal.App.3d 1347, 1350 (*Abarca*).

*Abarca* held that in determining whether a prior conviction was “serious,” a reporter’s transcript of a change of plea hearing was found to be admissible, over a hearsay objection, when that transcript showed the defendant answered “yes” when asked by the court if he had pled guilty to burglary of a residence. (*Abarca, supra*, 233 Cal.App.3d at pp. 1349-1351.) Neither the plea form executed by defendant, sentencing transcript, or abstract of judgment in *Abarca* indicated whether the burglary involved a residence, qualifying it as a serious felony under section 667. (*Id.* at p. 1349.)

The *Abarca* court found that because it was the defendant’s own statement which was relied upon, he had an opportunity to dispute the purported admission in the prior proceeding and was given an opportunity to challenge the evidence presented against

him. (*Abarca, supra*, 233 Cal.App.3d at p. 1351.) Since the defendant's admission that he burglarized a residence was made in direct response to the court's questioning during formal plea proceedings, *Abarca* found it sufficiently reliable under the Evidence Code. Specifically, a reporter's transcript is admissible under Evidence Code section 1280 as an official record exception, and the defendant's statements constituted an admission under Evidence Code section 1220. (*Abarca*, at pp. 1350-1351.)

The situation here is similar to *Abarca*. Neither the criminal complaint nor the plea form executed by appellant specifically indicated whether the violation of section 246.3 involved the personal use of a firearm. The transcript from the plea hearing, however, indicates appellant was advised that he was admitting a serious felony considered to be a strike. Appellant responded affirmatively when asked if he understood this. Appellant indicated that he discussed this point with his attorney. The court again asked appellant if he understood that if he was convicted of another felony, the conviction for section 246.3 would be considered a strike and would increase his punishment for a future conviction. Appellant again responded affirmatively. When the court recited the charging allegations to appellant, the court specifically told appellant that the violation of section 246.3 was "a serious felony." Immediately thereafter, appellant pled no contest to count one.

We reject appellant's argument that the court failed under section 969f to separately take the admission of a serious felony allegation from plea to count one.<sup>6</sup> It is clear from the criminal complaint that appellant is a lone actor in the charged offenses. There is no reference to another perpetrator. Appellant's conduct as charged in the

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<sup>6</sup> Section 969f provides a procedure whereby the prosecutor can allege that a count is a serious felony and further sets forth that "If the defendant pleads guilty of the offense charged, the question whether or not the defendant committed a serious felony as alleged shall be separately admitted or denied by the defendant."

complaint occurs on one day, June 24, 2010, and apparently occurred as one course of conduct.

Appellant admitted that he committed a serious felony after the trial court's specific advisements to appellant that he was admitting a serious felony that would be treated as a strike to increase his sentence for future convictions. Appellant further acknowledged that he had discussed this issue with his trial counsel. When this colloquy occurred between the court and appellant, appellant was doing more than merely acknowledging the court's advisement. We therefore find, under the facts of this case, that it would place form over substance to hold appellant's admission of a serious felony was invalid because the trial court did not first take his admission of the substantive offense and then take an admission that the offense was a serious felony.

Appellant admitted that he committed a serious felony. Appellant's violation of section 246.3 could not be a serious felony if he acted as an aider and abettor. Therefore, appellant's admission of a serious felony meant he was also admitting that he personally used a firearm within the meaning of section 1192.7, subdivision (c)(8) when he violated section 246.3. The evidence here was sufficient to support the trial court's finding that appellant's conviction for a violation of section 246.3 constituted a serious felony within the three strikes law.<sup>7</sup>

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<sup>7</sup> Constitutional protections against double jeopardy do not apply to noncapital sentencing proceedings, and thus do not bar retrial on the truth of prior convictions alleged for sentencing purposes that are reversed for insufficiency of the evidence. (*Monge v. California* (1998) 524 U.S. 721, 729-734; *People v. Monge* (1997) 16 Cal.4th 826, 829.) Similarly, retrial does not violate principles of due process, law of the case, or res judicata. (*People v. Barragan* (2004) 32 Cal.4th 236, 239, 241, 243-258.) The trier of fact may look to the entire record of conviction in determining the substance of the prior convictions, i.e., whether they constitute serious felonies. (*Guerrero, supra*, 44 Cal.3d at p. 355.)

Even if we were to find that there was insufficient evidence in this record to establish that appellant admitted a violation of section 246.3 as a serious felony, the

## **CUSTODY CREDITS**

Appellant contends, and respondent concedes, that he is entitled to additional custody credits in both cases.

In case No. BF134797A, appellant was arrested on November 25, 2010, and released that day. Appellant was rearrested on December 3, 2010, and held in custody until sentencing on April 27, 2011. Appellant was not given credit for the day he was incarcerated in November 2010. The court only awarded 146 days of actual custody credit instead of 147 days. Appellant received 72 days of conduct credits. Appellant was entitled to one more day of custody credit.

In case No. BF132737A, appellant was initially arrested on June 24, 2010. He was later placed on probation and released on October 7, 2010. Appellant was entitled to 106 days of custody credits for his initial incarceration. Appellant was given a concurrent sentence to his sentence in the other action. He was therefore entitled to custody credits in this case for the time he was incarcerated in the other action. (See *People v. Kunath* (2012) 203 Cal.App.4th 906, 908-911.) Appellant should have received an additional 147 days of custody credits for total custody credits of 253 days, but appellant only received 250 days of custody credits. Appellant received 124 days of conduct credits in this action. Appellant should have received conduct credits of 126 days. Accordingly, we will remand for the trial court to correct the abstract of judgment.

## **DISPOSITION**

The case is remanded for the trial court to add one day of custody credit in case No. BF134797A, to add three days of custody credit in case No. BF132737A, and to add

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parties stipulated at the change of plea hearing that the police report constituted the factual basis for appellant's plea. Although the trial court could not rely on hearsay statements in the probation officer's report to establish the facts of appellant's offense, it could rely on the facts of the police report pursuant to the stipulation by both parties.

two days of conduct credit in case No. BF132737A. The court shall prepare an amended abstract of judgment reflecting these changes and forward it to the appropriate authorities. The judgment is otherwise affirmed.