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

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD MURRAY PAYNE,

Defendant and Appellant.

F063494 & F063901

(Kern Super. Ct. Nos. BF132416A,
BF134130A, BF134601A &
BF135828A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Michael B. Lewis, and John R. Brownlee, Judge.*

Sylvia Whatley Beckham, 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 Tia M. Coronado, Deputy Attorneys General for Plaintiff and Respondent.

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* Judge Twisselman presided over the initial sentencing hearing on September 21, 2011. Judge Brownlee presided over the resentencing hearing on October 4, 2011.

INTRODUCTION

Appellant/defendant Richard Murray Payne has a lengthy criminal record. The instant appeal concerns his activities from 2008 to 2011, which began when he was arrested for committing drug offenses in 2008. He was released on bail on April 16, 2010, and failed to appear as ordered on April 26, 2010. A bench warrant was issued for his arrest, and he was returned to custody on or about May 26, 2010. Defendant was again released on bail on August 31, 2010, but he failed to appear on October 15, 2010, and a bench warrant was again issued for his arrest. Defendant was finally returned to custody when he was arrested on February 28, 2011, for committing additional drug offenses, and he remained in custody for the rest of the criminal proceedings.

Defendant was charged in four separate felony cases with committing the 2008 drug offenses, failing to appear on April 26, 2010, failing to appear on October 15, 2010, and committing the 2011 drug offenses. Defendant entered into a plea agreement in the 2011 drug case, and he was convicted in the three other cases after jury trials. He was sentenced to an aggregate term of 14 years 8 months in prison.

The instant case consolidates the four appeals which defendant has filed in the four separate cases. All his appellate contentions, however, are only concerned with his conviction after a jury trial in Superior Court of Kern County case No. BF132416A,¹ for violating Penal Code² section 1320.5, failure to appear on April 26, 2010, in case No. TF005315A, with an on-bail enhancement (§ 12022.1). Defendant contends the court should have granted his motion for acquittal of the on-bail enhancement (§ 1118.1) because the prosecution failed to prove that defendant was arrested on the bench warrant that was issued on April 26, 2010, within the meaning of section 12022.1. Defendant

¹ Unless otherwise indicated, all further case references are to cases filed in the Superior Court of Kern County.

² Unless otherwise indicated, all further statutory citations are to the Penal Code.

also contends the jury was not instructed on every element of the on-bail enhancement, in violation of *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). Finally, defendant argues the two-year term imposed for the on-bail enhancement must be stayed because there is no evidence that defendant was convicted of the underlying offense in case No. TF005315A.

The Attorney General concedes the on-bail enhancement must be stayed and the case remanded for further proceedings. We will issue the stay, and otherwise affirm defendant's convictions and the on-bail enhancement. (§ 12022.1.)

While defendant is only challenging his conviction in case No. BF132416A, for failing to appear on April 26, 2010, we must review the entire interrelated procedural history of these four cases.

FACTUAL AND PROCEDURAL HISTORY

The 2008 drug and firearm case

On the morning of April 11, 2008, officers searched a residence in Bakersfield. Defendant, his wife, their daughter, and another man were present. The officers found 215 grams of methamphetamine inside a fake hairspray can, and a digital scale. The drugs and scale were inside in a pink purse recovered from a bedroom closet. A can of cutting agent was in the bathroom. The officers also found a .22-caliber rifle in the garage. A police scanner was in the house, and it was tuned to the radio traffic from the Bakersfield Police Department. A camera was mounted on the roof, over the front door, and it was linked to a video monitor in the bedroom. Pay-owe ledgers were found in the garbage can.

Defendant was advised of the warnings pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), and initially denied any knowledge of drugs. After further questioning, defendant admitted the methamphetamine belonged to him, and explained in detail about how the drugs were hidden in the hairspray can and the pink purse. Defendant said he put the purse in his daughter's bedroom closet because she was not on

probation or parole, and he thought the police would not search in that room. Defendant said someone else left the rifle in the garage, and he was facilitating an exchange between two people.

Case No. TF005315A

In case No. TF005315A, defendant was charged with a felony offense. The parties agree that it is unclear from the instant appellate record as to the precise felony offense(s) that defendant was charged with. The record implies that he was likely charged with possession of methamphetamine for sale (Health & Saf. Code, § 11378) but does not include a complaint or information from case No. TF005315A.

The parties also agree that on April 16, 2010, defendant was released on a bail bond and ordered to return on April 26, 2010, for a jury trial in case No. TF005315A.

First failure to appear

On April 26, 2010, defendant failed to appear for the jury trial as ordered in case No. TF005315A, and the court issued a bench warrant for his arrest.

On May 26, 2010, defendant was arrested and returned to custody.³

On May 28, 2010, defendant appeared in court for the first time in case No. TF005315A since the bench warrant had been issued. Defendant was in custody.

Case No. BF132416A – Failure to appear on 4/26/10

On June 30, 2010, an information was filed in case No. BF132416A, which charged defendant with count I, failure to appear on April 26, 2010, after he was released on bail and ordered to return in case No. TF005315A.

³ In issue I, *post*, we will address and reject defendant's contentions that there is insufficient evidence to prove defendant was arrested on May 26, 2010, on the bench warrant issued for failing to appear in case No. TF005315A.

The information further alleged an on-bail enhancement, that defendant had been released on bail in case No. TF005315A when he committed the offense charged in count I; and six prior prison term enhancements (§ 667.5, subd. (b)).

On July 9, 2010, defendant pleaded not guilty, and bail was set at \$65,000. Defendant remained in custody.

Case Nos. TF005315A/BF123010A

Also on July 9, 2010, the felony charge in case No. TF005315A was consolidated with case No. BF123010A. The instant record does not contain a complaint or information for the consolidated case.

On July 26, 2010, the felony charge(s) in case No. BF123010A were dismissed.

Case No. BF132416A – Released on bail

On July 28, 2010, defendant was still in custody in case No. BF132416A, for his failure to appear on April 26, 2010. Defendant filed a motion for either reduction of bail or release on his own recognizance (OR).

On or about August 2, 2010, defendant posted bond of \$65,000 and was released on bail. Defendant posted bond before the court addressed his motion.

On August 6, 2010, the court denied defendant's motion for OR release or to reduce bail. Defendant remained on bail.

On August 20, 2010, defendant appeared in court and rejected a plea bargain. He remained on bail.

On August 31, 2010, defendant appeared in court, and the court ordered him to return for the readiness hearing on October 15, 2010. Defendant remained on bail.

Case No. BF134130A – 2008 drug and firearm case

In the meantime, on October 14, 2010, a complaint was filed in a new case (No. BF134130A) charging defendant with drug and firearm offenses committed on April 11, 2008. Defendant was charged with count I, possession of methamphetamine for sale (Health & Saf. Code, § 11378), with the special allegation that he was personally armed

with a firearm (§ 12022, subd. (c)); and count II, possession of a firearm by a felon (§ 12021, subd. (a)(1)). It was further alleged that defendant had two prior convictions for possession for sale (Health & Saf. Code, § 11370.2, subd. (c)), and served five prior prison terms (§ 667.5, subd. (b)).

Defendant was still on bail in case No. BF132416A, when the 2008 drug and firearm charges were filed against him.

Second failure to appear

On October 15, 2010, the day after the drug and firearm offenses were filed in the 2008 case, defendant failed to appear as ordered in case No. BF132416A. The court ordered forfeiture of the bail bond, and issued a no-bail bench warrant for defendant's arrest.

Case No. BF134601A – Failure to appear on 10/15/10

On November 19, 2010, while defendant remained at large, a new complaint was filed against him (case No. BF134601A) alleging count I, failure to appear on October 15, 2010, after defendant had been released on bail and ordered to appear in case No. BF132416A.

The information further alleged an on-bail enhancement (§ 12022.1), that defendant had been released on bail in case No. BF132416A when he committed the offense charged in count I; and six prior prison term enhancements (§ 667.5, subd. (b)).

DEFENDANT'S ARREST ON FEBRUARY 28, 2011

The entirety of the record suggests that the outstanding bench warrant for defendant's failure to appear on October 15, 2010, was not served, and defendant remained out of custody, until February 28, 2011, when defendant was arrested on new drug charges.

On February 28, 2011, officers executed a search warrant at a residence on Olive Drive in Bakersfield. They discovered defendant was living there with Amanda Ash, who appeared under the influence of narcotics.⁴

The officers found four plastic bags of marijuana, with a net weight of over 28.5 grams. They found two small plastic bindles, and several larger plastic bags, which contained methamphetamine and weighed 197 grams. There were also glass pipes and syringes in the house.

After being advised of the *Miranda* warnings, defendant said he knew about the methamphetamine, but claimed the drugs were placed in the house by someone else. Defendant said that person had “fronted” the drugs, so he could sell the drugs and later pay for them. Defendant would not reveal the person’s name. Defendant said Ash had nothing to do with the drugs.

Case No. BF135828A – 2011 drug case

On March 2, 2011, another complaint was filed against defendant, based on the February 28, 2011 drug case (case No. BF135828A & B). Defendant and Ash were charged with possession of methamphetamine for sale; possession of narcotics paraphernalia; and possession of more than 28.5 grams of marijuana.

An on-bail enhancement was alleged as to defendant, that he committed count I, possession for sale, while he was released on bail in case No. BF132416A (failure to appear on April 26, 2010). It was also alleged that defendant possessed 28.5 grams or more of methamphetamine for sale; he had two prior convictions for transportation and possession for sale; and four prior prison term enhancements.

⁴ The facts of the 2011 drug case are taken from the preliminary hearing since defendant later entered into a plea agreement in that case (No. BF135828A).

PROCEEDINGS AFTER RETURN TO CUSTODY

On March 2, 2011, defendant appeared in court for several cases. This was his first appearance after the bench warrant had been issued for his failure to appear on October 15, 2010. Defendant was in custody.

First, defendant appeared in case No. BF132416A, which alleged he failed to appear on April 26, 2010 in the original felony case No. TF005315A. The court vacated the bench warrant. The court also set aside, reinstated, and exonerated the bail bond.

Defendant also appeared in case No. BF134601A, which alleged he failed to appear on October 15, 2010, in case No. BF132416A. He pleaded not guilty and denied the on-bail enhancement.

In case No. BF135828A, defendant pleaded not guilty to the drug charges based on the February 28, 2011, search, and denied the special allegations. Finally, defendant appeared in case No. BF134130A, the charges based on the 2008 drug case, and pleaded not guilty.

The court set bail at \$100,000 in each case. Defendant did not post bail and remained in custody for the remainder of the proceedings.

Jury Trial in Case No. BF132416A – failure to appear

On May 2, 2011, defendant's jury trial began in case No. BF132416A, for failing to appear on April 26, 2010, in the original case No. TF005315A. In issue I, *post*, we will address the evidence introduced at that trial.

On May 5, 2011, defendant was convicted of count I, failure to appear, and the jury found the on-bail enhancement true. The court found five of the six prior prison term allegations true.⁵

⁵ All of defendant's appellate issues are based on his conviction in case No. BF132416A.

Preliminary hearings and informations

On June 16, 2011, the court conducted preliminary hearings in the 2008 drug case (No. BF134130A), the October 26, 2010, failure to appear case (No. BF134601A), and the 2011 drug case (No. BF135828A). Defendant was held to answer.

On June 22, 2011, three separate informations were filed against defendant in these three cases. Defendant pleaded not guilty and denied the special allegations.

Plea in 2011 drug case

On August 9, 2011, defendant pleaded guilty in case No. BF135828, to count I, possession of methamphetamine for sale on February 28, 2011, and admitted the on-bail enhancement, that he committed the offense while released on bail in case No. BF132416A.

On the same day, defendant rejected the prosecution's offer to plead to the 2008 drug charges (case No. BF134130A) in exchange for dismissal of the charges in case No. BF134601A (failing to appear on October 15, 2010).

Trial in Case No. BF134601A – Failure to appear on 10/15/10

On August 17, 2011, after a jury trial, defendant was convicted in case No. BF134601A for failing to appear on October 15, 2010, and the jury found the on-bail enhancement true. The court dismissed the prior prison term enhancements.

Trial in Case No. BF134130A – 2008 drug case

On September 6, 2011, after a jury trial, defendant was convicted in case No. BF134130A of the 2008 drug offenses: count I, possession of methamphetamine for sale, with an enhancement for possession of more than 28.5 grams, and count II, possession of a firearm by a felon. The court dismissed the prior conviction allegations since they were identical to those already found true in the prior case.

SENTENCING

On September 21, 2011, the court imposed sentences in case Nos. BF134601A, BF132416A, and BF135828A. On September 22, 2011, defendant filed notices of appeal in those three cases (F063494).

On October 4, 2011, the court conducted a hearing to impose and correct the sentence in all four cases, and designated the principal case as No. BF134130A (the 2008 drug offenses) and the other three cases as subordinate cases.

The court sentenced defendant to three years eight months in case No. BF134130A, the 2008 drug and firearm offenses.

The court imposed seven years eight months in case No. BF132416A; two years eight months in case No. BF134601A; and eight months in case No. BF135828A; to be served consecutively to the term imposed in case No. BF134130A.

Defendant's aggregate term for all four cases was 14 years 8 months.

On November 14, 2011, defendant filed a notice of appeal in case No. BF134130A (F063901).⁶

DISCUSSION

I. Denial of the motion to acquit

As mentioned above, all of defendant's appellate issues are based on his conviction in case No. BF132416A, where he was charged and convicted of failing to appear on April 26, 2010, in violation of section 1320.5, and the jury found true the section 12022.1 enhancement for committing the offense while on bail in case No. TF005315A.

On appeal, defendant contends the trial court should have granted his motion for acquittal after the prosecution rested its case (§ 1118.1) because the prosecution failed to

⁶ This court has consolidated the appeal in F063901 with the three appeals filed in F063494. All four cases are being treated in this court as F063494.

introduce evidence to prove the on-bail enhancement, that he was “arrested” within the meaning of section 12022.1, on the bench warrant issued for his failure to appear in case No. TF005315A.

The People contend that a section 1118.1 motion for acquittal cannot be entertained for a status-based on-bail enhancement. In the alternative, the People argue the court properly denied defendant’s motion to acquit because there was substantial evidence of his arrest on the bench warrant.

A. Sections 1320.5 and 12022.1

We begin with the charges in this case. Defendant was charged and convicted of failing to appear in violation of section 1320.5, with an on-bail enhancement pursuant to section 12022.5.

Section 1320.5 defines a substantive criminal offense: “Every person who is charged with or convicted of the commission of a felony, who is released from custody on bail, and who in order to evade the process of the court willfully fails to appear as required, is guilty of a felony.... Willful failure to appear within 14 days of the date assigned for appearance may be found to have been for the purpose of evading the process of the court.”

“Unlike section 1320.5, section 12022.1 does not define a criminal offense; instead, it identifies circumstances under which a defendant charged with a substantive offense is subject to a sentence enhancement.” (*People v. Walker* (2002) 29 Cal.4th 577, 582 (*Walker*).) Section 12022.1, subdivision (b) defines the on-bail enhancement:

“Any person *arrested for a secondary offense* which was alleged to have been committed while that person was released from custody on *a primary offense* shall be subject to a penalty enhancement of an additional two years which shall be served consecutive to any other term imposed by the court.” (Italics added.)

For purposes of the on-bail enhancement, a “primary offense” means “a felony offense for which a person has been released from custody on bail or on his or her own

recognizance prior to the judgment becoming final” (§ 12022.1, subd. (a)(1).) A “secondary offense” means “a felony offense alleged to have been committed while the person is released from custody for a primary offense.” (§ 12022.1, subd. (a)(2).)

“The language of section 12022.1 provides no exception to its application in the event that the defendant’s only secondary offense is a violation of section 1320.5.” (*Walker, supra*, 29 Cal.4th at p. 582.) “[T]he Legislature intended section 12022.1 to apply where ... the only felony the defendant commits while released on bail is a failure to appear in violation of section 1320.5. [B]ecause a section 12022.1 sentence enhancement is not based on the same act or omission for which punishment is authorized under section 1320.5, sentencing under both statutes may be imposed without violating section 654’s bar against multiple punishment.” (*Id.* at p. 580.)

As applied to this case, the primary offense for the on-bail enhancement was the felony charge filed against defendant in case No. TF005315A, for which he was released on bail on April 16, 2010. Defendant was charged in case No. BF132416A with committing the secondary offense of failing to appear on April 26, 2010, in case No. TF005315A, with an on-bail enhancement.

Defendant contends the court should have granted his motion for acquittal for the on-bail enhancement because the prosecution failed to prove that he had been arrested for committing the secondary offense. Defendant concedes that he was returned to custody at some point after April 26, 2010, but argues the prosecution failed to introduce competent evidence that he was arrested on the bench warrant issued for his failure to appear on April 26, 2010, in case No. TF005315A.

With this background in mind, we turn to the procedural history and evidence introduced in this case.

B. Procedural Background

As set forth above, the parties agree that in case No. TF005315A, defendant was charged with a felony offense.

On April 16, 2010, defendant was released on bail in case No. TF005315A. The court ordered him to return on April 26, 2010, for a jury trial in that case. On April 26, 2010, defendant failed to appear. The court issued a bench warrant for his arrest in case No. TF005315A.

As we will explain, *post*, defendant was arrested on May 26, 2010. On May 28, 2010, defendant returned to court and appeared in case No. TF005315A.

On June 30, 2010, an information was filed in case No. BF132416A (the case at issue on appeal), which charged defendant with count I, his failure to appear as ordered in case No. TF005315A on April 26, 2010; with an on-bail enhancement, that defendant had been released on bail in case No. TF005315A when he committed the offense charged in count I.

On July 9, 2010, defendant pleaded not guilty and denied the enhancement.

Also as set forth, *ante*, defendant again failed to appear on October 15, 2010, and was not returned to custody until February 28, 2011.

C. The prosecution's documentary evidence

On May 2, 2011, defendant's jury trial finally began in case No. BF132416A, for failing to appear on April 26, 2010, with the on-bail enhancement.

During motions in limine, the prosecution moved for the court to take judicial notice of certain facts from the docket in case No. TF005315A. After hearing argument, the court granted the prosecution's motion for judicial notice.

At trial, the prosecution did not present any witnesses. Instead, it moved to introduce a documentary exhibit as follows:

“THE COURT: ... Are you going to be asking the Court to take judicial notice at this time?”

“[THE PROSECUTOR]: I am, your Honor. First I would like to *enter the exhibit*.”

“THE COURT: You may.” (Italics added.)

The court marked the documents as exhibit No. 1. The prosecutor moved to introduce the exhibit into evidence, and defense counsel submitted the matter. The court granted the prosecutor's motion and admitted exhibit No. 1 into evidence without any restrictions or limitations.

Exhibit No. 1 consisted of docket entries in case No. TF005315A. The docket entries state that defendant was charged with a violation of Health and Safety Code section 11378, possession of methamphetamine for sale. He was in custody from April 2009 to January 2010, when he was released on \$15,000 bail. On April 16, 2010, he appeared for a hearing while on bail, and was ordered to return on April 26, 2010.

According to the docket entries, on April 26, 2010, defendant failed to appear, and the court issued a no-bail bench warrant. On May 26, 2010, the bench warrant was served and defendant was arrested. On May 28, 2010, defendant appeared in court for the return on the bench warrant, and he was in custody.

D. Judicial notice

After the court admitted Exhibit No. 1, it asked the prosecutor about the judicial notice motion.

“THE COURT: At this time ... are you asking the Court to take judicial notice of certain facts?”

“[THE PROSECUTOR]: Yes, your Honor, of facts contained in People's Exhibit 1.

“THE COURT: Okay. But you are asking the Court to specifically admonish the jury *with regard to certain of those facts*.

“[THE PROSECUTOR]: Yes.” (Italics added.)

The court advised the jury that it was taking judicial notice of certain facts which the jury should accept as true: defendant was charged with a felony in case No. TF005315A; on April 16, 2010, defendant was released on bail; he was ordered to return to court on April 26, 2010, for a jury trial; defendant did not appear as ordered on

April 26, 2010; a bench warrant was issued on April 26, 2010; defendant appeared in case No. TF005315A after the issuance of the bench warrant on May 28, 2010; and defendant did not appear in court between April 26 and May 28, 2010, or file a motion to surrender himself to the court.

E. Motion for acquittal

After the court read the judicially noticed facts, the People rested. Defense counsel stated that he had a motion. The court conducted an unreported sidebar conference. Thereafter, the court said it would later make a record of its ruling, outside the jury's presence.

Later in the trial, outside the jury's presence, the court stated that defense counsel had timely made a motion for acquittal pursuant to section 1118.1, after the People rested. The court further stated it heard and denied the motion. The record is silent as to whether defendant raised certain issues during the motion for acquittal, he addressed the substantive charge of failing to appear and/or the on-bail enhancement, or the court made any findings when it denied the motion.

F. Defendant's testimony

When the trial resumed, defendant testified and admitted that he had been released on bail in case No. TF005315A, he was ordered to return for his jury trial on April 26, 2010, he did not appear in court that day, and he failed to return to court until May 28, 2010.

On cross-examination, the prosecutor asked defendant if he returned to court because he had been arrested. Defendant said yes, but he could not remember the date of his arrest. The prosecutor asked defendant to review additional documentary exhibits, including booking records. Defendant reviewed the documents and testified that he was arrested by the Bakersfield Police Department on May 26, 2010, booked into jail that day, and he was in custody when he appeared in case No. TF005315A on May 28, 2010. Defendant admitted he never appeared in court or surrendered himself prior to May 28,

2010. Defendant complained that the charges in case No. TF005315A had been dismissed and refiled:

“[DEFENDANT]: Just now they refiled the charges. These charges were dismissed and never refiled again until they picked me up for this failure to appear. Then they refiled it.

“[THE PROSECUTOR]: And you were picked up on May 26, 2010. Right?

“[DEFENDANT]: Yes. And it was refiled before I didn’t – nobody got in contact with me to tell me that they have refiled it.

“[THE PROSECUTOR]: However, this case, this TF005315A case, was still active and pending trial on April 26, 2010, when you were ordered to come back to court for jury trial. Right?

“[DEFENDANT]: It was then.

“[THE PROSECUTOR]: And it was still pending and active when you failed to appear for that jury trial on April 26, 2010. Right?

“[DEFENDANT]: Yes, sir.”

Defendant was convicted of failing to appear, and the jury found the on-bail enhancement true.

G. Analysis

Defendant contends the court should have granted his motion for acquittal of the on-bail enhancement when the prosecution rested. Defendant argues the prosecution failed to present evidence to prove that he had been arrested on the bench warrant in case No. TF005315A, for committing the secondary offense of failing to appear on April 26, 2010.

“An appellate court reviews the denial of a section 1118.1 motion under the standard employed in reviewing the sufficiency of the evidence to support a conviction. [Citation.] ‘In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we “examine the whole record in the light most

favorable to the judgment to determine whether it discloses substantial evidence – evidence that is reasonable, credible and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] “[I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.” [Citation.] We do not reweigh evidence or reevaluate a witness’s credibility.’ [Citation.] Review of the denial of a section 1118.1 motion made at the close of a prosecutor’s case-in-chief focuses on the state of the evidence as it stood at that point. [Citation.]” (*People v. Houston* (2012) 54 Cal.4th 1186, 1215.)

“ ‘The purpose of a motion under section 1118.1 is to weed out as soon as possible those few instances in which the prosecution fails to make even a prima facie case.’ [Citations.] The question ‘is simply whether the prosecution has presented sufficient evidence to present the matter to the jury for its determination.’ [Citation.] The sufficiency of the evidence is tested at the point the motion is made. [Citations.] The question is one of law, subject to independent review. [Citation.]” (*People v. Stevens* (2007) 41 Cal.4th 182, 200.)

We note that defendant’s motion for acquittal was made, heard, and denied during an off-the-record sidebar hearing. Defendant never clarified whether his motion was based on the substantive charge of failing to appear and/or the on-bail enhancement. However, a defendant need not articulate the grounds for his motion for acquittal, and there is no requirement that the motion be made in a particular form or on specific points. (See, e.g., *People v. Cole* (2004) 33 Cal.4th 1158, 1213; *People v. Smith* (1998) 64 Cal.App.4th 1458, 1468.)

On appeal, the People assert that defendant could not make a motion for acquittal for an on-bail enhancement, because section 1118.1 motions are not permitted for status-based enhancements. The People alternatively argue that section 12022.1 does not require proof of an actual arrest on the secondary offense in order to prove the elements of an on-bail enhancement.

We need not resolve these issues because even assuming that the court properly considered a motion for acquittal of the on-bail enhancement, and that section 12022.1 requires the prosecution to prove defendant was arrested for the secondary offense, defendant's motion was properly denied. The court admitted exhibit No. 1 into evidence without objection. The exhibit consisted of the docket entries for case No. TF005315A, the primary offense which was the basis for the secondary offense of failing to appear and the on-bail enhancement in this case. The docket entries demonstrate that defendant was released on bail, he was ordered to return on April 26, 2010, for his jury trial, he failed to appear, a bench warrant was issued for his arrest, he was arrested on that bench warrant on May 26, 2010, and he returned to court while in custody on May 28, 2010.

Defendant concedes such facts are contained in exhibit No. 1, but argues that the documentary exhibit was only introduced in support of the court's judicial notice ruling, and the court did not judicially notice the fact of defendant's arrest on the bench warrant on May 26, 2010, as reflected in the docket. As set forth above, however, the court admitted Exhibit No. 1 without any restrictions or limitations. When the court turned to the prosecution's judicial notice matter, it clarified that the prosecutor was asking the court to "to specifically admonish the jury *with regard to certain of those facts.*" (Italics added.) While the judicially noticed facts were based on the docket entries, the court did not restrict the jury's consideration of exhibit No. 1 to those judicially noticed facts.

Defendant next contends that the court should have granted the motion for acquittal because the only evidence that he was arrested on the bench warrant consisted of inadmissible hearsay in the docket entries of exhibit No. 1. (See, e.g., *People v. Duran*

(2002) 97 Cal.App.4th 1448.)⁷ While defendant objected to some of the judicial notice issues, however, he never objected to the introduction of the documents contained in exhibit No. 1. His failure to object necessarily waives any possible hearsay issues. (Evid. Code, § 353; *People v. Riccardi* (2012) 54 Cal.4th 758, 827, fn. 33; *People v. Williams* (2008) 43 Cal.4th 584, 626; *Rupf v. Yan* (2000) 85 Cal.App.4th 411, 430-431.)

Defendant concedes that he ultimately testified at trial and admitted he had been arrested for failing to appear, but asserts that this court can only consider the evidence which had been introduced by the prosecution at the time he moved for acquittal. The federal circuit courts have held: “[A] criminal defendant who, after denial of a motion for judgment of acquittal at the close of the government’s case-in-chief, proceeds with the presentation of his own case, waives his objection to the denial. The motion can of course be renewed later in the trial, but appellate review of denial of the later motion would take into account all evidence introduced to that point.” (*U.S. v. Foster* (D.C. Cir. 1986) 783 F.2d 1082, 1085; *United States v. Martinez* (9th Cir.1975) 514 F.2d 334, 337.) However, the federal waiver rule has not been adopted in California. It is directly contrary to California Supreme Court cases which hold that appellate review of a motion for acquittal must be based on the evidence before the court at the time the motion was made. (See, e.g., *People v. Cole, supra*, 33 Cal.4th at p. 1213; *In re Anthony J.* (2004)

⁷ *Duran* held “Evidence Code section 452.5, subdivision (b) creates a hearsay exception allowing admission of qualifying court records to prove not only the fact of conviction, but also that the offense reflected in the record occurred.” (*People v. Duran, supra*, 97 Cal.App.4th at pp. 1460-1461.) However, Evidence Code section 452.5 addresses the admissibility of computer-generated official court records “which relate to criminal convictions,” and “an official record of conviction.” (Evid. Code, § 452.5, subs. (a), (b).) While exhibit No. 1 consists of official court records from case No. TF005315A, these entries were for a case which was later consolidated and dismissed, rather than an official record of “conviction.”

117 Cal.App.4th 718, 732.) Defendant is thus correct that his trial testimony cannot be relied upon to determine whether the trial court properly denied his motion for acquittal.

Finally, defendant contends that defense counsel was prejudicially ineffective for failing to raise a hearsay objection to the docket entry that he was arrested on the bench warrant. “To establish ineffective assistance, defendant bears the burden of showing, first, that counsel’s performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms. Second, a defendant must establish that, absent counsel’s error, it is reasonably probable that the verdict would have been more favorable to him. [Citations.]” (*People v. Hawkins* (1995) 10 Cal.4th 920, 940, overruled on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110, and *People v. Blakeley* (2000) 23 Cal.4th 82, 89.)

As explained above, the court may deny a motion for acquittal based on circumstantial evidence. If the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding. (*People v. Houston, supra*, 54 Cal.4th at p. 1215.) At the time defendant moved for acquittal, the prosecution’s evidence consisted of both the docket entries in exhibit No. 1, and the judicially noticed facts. The court took judicial notice that a bench warrant was issued on April 26, 2010, for his failure to appear; on May 28, 2010, defendant appeared in case No. TF005315A after the issuance of the bench warrant; and defendant did not appear in court between April 26 and May 28, 2010, or file a motion to surrender himself to the court.

Based on the judicially noticed facts, there was direct evidence that a bench warrant was issued for defendant’s arrest for failing to appear on April 26, 2010; and that defendant did not appear or surrender himself to the court between April 26 and May 28, 2010. More importantly, there was circumstantial evidence from which it could be inferred that defendant only returned to court on May 28, 2010, because he was arrested

on the bench warrant, since he did not voluntarily appear or surrender himself to the court.

We thus conclude that even if a motion for acquittal may be brought for an on-bail enhancement, and that the prosecution had to prove that the defendant has been “arrested” on the secondary offense, the trial court in this case properly denied the motion for acquittal based on the circumstantial evidence and reasonable inferences from the judicially noticed facts that defendant did not voluntarily return to court on May 28, 2010, because he had been arrested on the bench warrant. Defense counsel’s failure to raise hearsay objections to the docket entries was not prejudicial.

II. Instruction on for the on-bail enhancement

Defendant next contends that the court failed to instruct the jury on all the elements of the on-bail enhancement, in violation of *Apprendi*. The jury received CALCRIM No. 3250 as to the elements of the on-bail enhancement:

“If you find the defendant guilty of the crime charged in Count one, you must then decide whether the People have proved the additional allegation that at the time the defendant committed the crime charged in Count one, it was while he was released from custody pending trial in Court Case No. TF005315A.

“The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.”

Defendant argues this instruction was erroneous and incomplete because the jury should have been instructed that it had to find he had been arrested for a felony, he was released on bail or his own recognizance, and he was arrested for committing a new felony offense.

A. Right to a jury trial for the on-bail enhancement

Defendant’s argument is based on *Apprendi*, which held: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed

statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi, supra*, 530 U.S. at p. 490.)

Defendant’s *Apprendi* argument is based on the premise that he had the right to a jury trial on the truth of the section 12022.1 on-bail enhancement. In *People v. Johnson* (2012) 208 Cal.App.4th 1092 [review denied], however, the Third District recently held that a defendant is not entitled to a jury trial on the truth of the on-bail enhancement, because section 12022.1 is an enhancement statute which “penalizes recidivist conduct and does not relate to the commission of either the primary or secondary offense” (*Id.* at p. 1100.)

Johnson reached this conclusion based on a series of California Supreme Court cases which held that a judge, rather than a jury, determines the existence of the aggravating circumstances of whether a defendant served a prior prison term, he was on probation or parole when the crime was committed, or his prior performance on probation or parole was unsatisfactory. (*Johnson, supra*, 208 Cal.App.4th at p. 1099, citing *People v. Towne* (2008) 44 Cal.4th 63, 70-71, 79.) The California Supreme Court also held, consistent with *Apprendi*, that the trial court may determine whether a prior conviction is a serious felony, or whether a defendant’s prior convictions are numerous and of increasing seriousness. (*Johnson, supra*, 208 Cal.App.4th at p. 1099; citing *People v. McGee* (2006) 38 Cal.4th 682, 706; *People v. Black* (2007) 41 Cal.4th 799, 818-820.) *Johnson* further noted that the court, and not a jury, determines the truth of a prior prison term enhancement. (*Johnson, citing*, 208 Cal.App.4th at p. 1099, citing *People v. Thomas* (2001) 91 Cal.App.4th 212, 220-223.)

“The bases for the above holdings were, in general, that the aggravating factors were all related to ‘the fact of a prior conviction’ by their recidivistic nature, rather than to the conduct involved in the charged offense(s), and that such factors could be proven by reliable documentation, such as court records. [Citations.] [¶] Section 12022.1 is a recidivist statute – it enhances punishment based upon the defendant’s commission of another offense while on bail for a previous offense. [Citations.] [¶] The

only difference between a defendant who commits a felony offense while on probation or parole and a defendant who commits a felony offense while on bail for another felony offense is the timing. In the former circumstance, the prior conviction (primary offense) has already occurred. The distinction is insignificant because in the latter circumstance the defendant cannot be punished until he is convicted of the primary offense. Of course, in both circumstances, additional punishment requires a conviction of the second charged offense.” (*Johnson, supra*, 208 Cal.App.4th at p. 1099-1100.)

Johnson thus concluded that a defendant did not have the right to a jury trial for the on-bail enhancement. Based on this conclusion, defendant’s *Apprendi* argument about the correctness of the jury instruction in this case would be meritless.

B. *Apprendi* error

Even if defendant had the right to a jury trial for the on-bail enhancement, the alleged *Apprendi* error would be harmless beyond a reasonable doubt. *Apprendi* error is not reversible per se but is reviewed under the harmless error standard set forth in *Chapman v. California* (1967) 386 U.S. 18. (*People v. Sandoval* (2007) 41 Cal.4th 825, 838; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326-328 [*Chapman* harmless error standard applies to *Apprendi* error in failing to instruct on element of sentencing enhancement].) Even when jury instructions completely omit an element of a crime, and therefore deprive the jury of the opportunity to make a finding on that element, a conviction may be upheld under *Chapman* if the record does not contain evidence “that could rationally lead to a contrary finding” with respect to that element. (*Neder v. United States* (1999) 527 U.S. 1, 19; *People v. Flood* (1998) 18 Cal.4th 470, 502-505; *People v. Davis* (2005) 36 Cal.4th 510, 564.)

Any instructional error in this case is harmless beyond a reasonable doubt. As set forth in issue I, *ante*, defendant testified at trial and admitted that he was released on bail in case No. TF005315A, he was ordered to return for trial, he failed to appear, he never surrendered himself or reappeared in court, he was arrested on the bench warrant, and he returned to court in custody.

III. The on-bail enhancement must be stayed

As explained in issue I, *ante*, the primary offense for purpose of the on-bail enhancement was the felony charged in case No. TF005315A. The secondary offense was defendant's failure to appear on April 26, 2010, in case No. TF005315A. Defendant was charged and convicted in case No. BF132416A with committing the secondary offense of count I, failure to appear (§ 1320.5), with the on-bail enhancement. In case No. BF132416A, defendant was sentenced to an aggregate term of seven years eight months, based on eight months (one-third the midterm) for count I, failure to appear; a consecutive term of two years for the on-bail enhancement; and five consecutive one-year terms for the prior prison term enhancements.

Defendant contends, and the People concede, that the two-year consecutive term imposed for the on-bail enhancement must be stayed because it is unclear from the record whether defendant had been tried and convicted for committing the substantive charges in the primary offense in case No. TF005315A, when he was sentenced in case No. BF132416A for the on-bail enhancement for committing the secondary offense of failing to appear in that case on April 26, 2010.

Section 12022.1, the on-bail enhancement, "recognizes that in some cases, the defendant may not have been convicted of the primary offense at the time the section 12022.1 allegation is tried, because the secondary offense may be tried first." (*People v. Smith* (2006) 142 Cal.App.4th 923, 935.) In such instances, "the imposition of the [on-bail] enhancement shall be stayed pending imposition of the sentence for the primary offense...." (§ 12022.1, subd. (d).) "Our Supreme Court has unequivocally stated that a conviction for the criminal charge on the primary offense is an essential prerequisite to the imposition of the 'on bail' enhancement. Under section 12022.1, the 'requirement of "conviction" for the earlier "bailed" offense appears principally intended to establish with judicial certainty that the charges leading to release on bail or O.R. were valid.... In other words, the Legislature has declined to apply the bail/O.R. enhancement to an offense

unless a court has also sustained the charge on which the offender was released when he committed it....' [Citation.]" (*In re Ramey* (1999) 70 Cal.App.4th 508, 512.)

As explained above, the parties agree defendant was charged with a felony offense in case No. TF005315A. In addition, there is overwhelming evidence to support his conviction in case No. BF132416A for failing to appear on April 26, 2010, and that he was on bail when he failed to appear and was arrested on the bench warrant. Given defendant's numerous failures to appear, however, the four felony cases were not tried in the order in which the offenses were committed or the cases were filed. As explained above, defendant was tried and convicted of committing the secondary offense before the primary offense.

In addition, the precise nature and disposition of the felony charge in case No. TF005315A (the primary offense) is unclear from the instant record. The record implies that he might have been charged with possession for sale based on the 2008 drug offenses. However, on July 9, 2010, the felony charge(s) in case No. TF005315A was consolidated into case No. BF123010A. On July 26, 2010, the felony charge(s) in case No. BF123010A were dismissed. On October 14, 2010, when defendant was on bail, a complaint was filed in case No. BF134130A, charging defendant with drug and firearm offenses committed in 2008.

While defendant was eventually convicted of the 2008 drug offenses in case No. BF134130A, it is not clear from the record before this court whether those were the same offenses originally charged in case No. TF005315A, the primary offense for purposes of the on-bail enhancement in this case. When the court conducted the sentencing hearing for all four cases, however, it imposed a consecutive two-year term for the on-bail enhancement in the secondary offense of case No. BF132416A, even though the probation report addressed the possible problem that defendant had not yet been convicted of the primary offense.

Given the procedural history of this case, the parties agree that the two-year term imposed for the on-bail enhancement in case No. BF132416A (based on defendant's failure to appear in case No. TF005315A) must be stayed pursuant to section 12022.1, subdivision (d), pending conviction of the charges originally alleged in case No. TF005315A, or further clarification of the record. (See, e.g., *People v. Johnson*, *supra*, 208 Cal.App.4th at pp. 1098-1099.)

DISPOSITION

The two-year term imposed for the on-bail enhancement in case No. BF132416A (based on defendant's failure to appear in case No. TF005315A) is stayed pursuant to section 12022.1, subdivision (d), pending conviction of the charges originally alleged in case No. TF005315A, or further clarification of the record. If defendant has already been convicted of the charges in that case, or is subsequently convicted, the court may then lift the stay for that two-year term. The matter is remanded for further appropriate proceedings. In all other respects, the judgment is affirmed.

Poochigian, J.

WE CONCUR:

Cornell, Acting P.J.

Gomes, J.