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

THE PEOPLE,

Plaintiff and Respondent,

v.

ERNEST JARMONE DeFRANCE,

Defendant and Appellant.

F063498

(Tulare Super. Ct. No. VCF245895)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. James W. Hollman, Judge.

Peggy A. Headley, 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, Julie A. Hokans and Galen N. Farris, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Poochigian, J. and Detjen, J.

INTRODUCTION

Defendant contends that the trial court and clerk failed to comply with Penal Code¹ section 1149, which requires that the jury be asked whether they have agreed upon their verdict. (§ 1149.) We do not reach the merits of this contention, because defendant forfeited any claim of section 1149 error by failing to object below. (See *People v. Anzalone* (2013) 56 Cal.4th 545 (*Anzalone*).)

Defendant also claims, and the People concede, that there was insufficient evidence to sustain the trial court's true finding with respect to his prior strike. We agree.

Finally, defendant argues that the court erred in using the same conviction to enhance and aggravate his sentence. This contention lacks merit.

Therefore, we will reverse with respect to the prior strike finding only, and remand for possible retrial on that issue.

FACTS

Defendant was charged with assault with a deadly weapon (count I – § 245, subd. (a)(1)) and misdemeanor battery (count II - § 242) in a first amended information (the information).

The information further alleged two prior serious felony convictions (§ 667, subd. (a)(1)), two prior prison terms (§ 667.5, subd. (b)), and two section 1203, subdivision (e)(4) convictions all based on the same two prior Oregon convictions: felony unlawful sexual penetration (see O.R.S. § 163.411) and attempted felony sexual abuse (see O.R.S. §§ 163.427 & 161.405, subd. (a).)² It was further alleged that the Oregon felony unlawful sexual penetration conviction qualified as a prior strike (§§ 1170.12, subds. (a)-(i) & 667, subds. (b)-(i).)

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

² For both Oregon convictions, the alleged conviction date was July 19, 2006, with a case number of 061583FE (the Oregon case).

An alleged grand theft conviction (§ 487) on September 4, 2008, in Tulare County was the basis for a third prior prison term allegation (§ 667.5, subd. (b)), and a third section 1203, subdivision (e)(4) allegation.

A jury trial commenced in August 2011, and the jury found appellant guilty as charged. The following proceedings were had:

“THE COURT: All right. We’re back on the record. It’s the Court’s understanding the jury reached a verdict. [¶] Is that correct? Who’s the foreperson?”

“JUROR []: Yes.

“THE COURT: If you’ll hand the verdict forms to the bailiff, please. [¶] All right. I will have my clerk read the verdicts.”

“THE CLERK: Tulare County Superior Court, State of California. Visalia Division. The People of the State of California versus Ernest Jarmone Defrance. Case Number VCF 245895. Verdict Form. [¶] We, the jury, find defendant guilty as charged in Count 1 of the complaint of assault with a deadly weapon, a violation of Penal Code Section 245(a)(1), a felony, against Rolando Martinez. Dated August 31, 2011. Signed the foreperson. [¶] Title of court and cause. We, the jury, find the defendant guilty of Count 2 of the complaint of simple battery, a violation of Penal Code Section 242, a misdemeanor, against Andrew Gonzalez. Dated August 31st, 2011. Signed the foreperson.

“THE COURT: Do you wish the jury to be polled?”

“[DEFENSE COUNSEL]: No, your Honor.”

The record reflects no objection by defense counsel on section 1149 grounds. There was then a discussion wherein defendant ultimately waived his right to a jury on the prior convictions portion of the bifurcated trial. The court then discharged the jury. The record reflects that no juror spoke at any time after the clerk read the verdict.

Bifurcated Court Trial on Prior Strike and other Special Allegations

A court trial was held regarding the special allegations in the information. The matter was tried solely on documentary evidence submitted by the prosecution, which

included: defendant's "Oregon 969(b) Packet"; a facsimile from the Jackson County District Attorney's Office, defendant's "California 969(b) Packet"; the change of plea form, judgment and indictment from the Oregon case; and a printout of CALCRIM 1045.

The change of plea form in the Oregon case indicates that defendant pled guilty to attempted sexual abuse in the first degree (see O.R.S. §§ 163.427 & 161.405, subd. (a)) and attempted unlawful sexual penetration in the first degree (see O.R.S. § 163.411). The judgment reflects resultant convictions on both counts.

At the conclusion of the trial, the court stated: "The Court has reviewed the complaining document as well as the judgment, and it appears to the Court that it's identical with Penal Code Section 289(a), attempted penetration by force, which is a 1192.7 crime, which is a serious crime, which means that it is a strike."

Sentencing

Defendant was sentenced on October 3, 2011.

Near the beginning of the hearing, the trial court indicated, "It looks to me like there's a basis to aggravate." The court noted that, "[a]ccording to the probation report, he'd been out on parole for something like twelve days and he committed a new crime. To me, that's aggravated." Defense counsel indicated that defendant had mental health issues and was off his medications. The prosecutor requested 15 years, rather than the 14 years recommended by the probation report.

The court stated: "This defendant was barely out of prison when he committed this new offense, and it was a great – a crime of great violence, and he's a danger to the community. He's out for twelve days and he's chasing somebody around with a piece of glass. [¶] I am going to order the aggravated term of eight years on that basis, plus an additional five years pursuant to 667(a), plus an additional one year pursuant to 667.5, for a total term of 14 years."

The court later stated, “[t]he other 667.5(b) allegation, the punishment is stricken in the interest of justice.”³

ANALYSIS

I.

DEFENDANT FORFEITED HIS CLAIM OF SECTION 1149 ERROR BY FAILING TO OBJECT IN THE TRIAL COURT

Defendant contends that the court’s failure to strictly comply with section 1149 was structural error, requiring reversal. He contends that the doctrines of forfeiture, substantial compliance and harmlessness do not apply to section 1149 errors. Respondent contends that all three doctrines do apply to section 1149 errors.

³ Defendant contends in his brief that the court struck the prior prison term enhancement relating to the July 19, 2006, Oregon conviction. However, the context shows that the court was actually striking the prior prison term enhancement for the September 4, 2008, grand theft conviction. Immediately before the court began pronouncement of the sentence, the court and the prosecutor had the following exchange:

“[Prosecutor]: ... The attempted sexual child abuse supports the 667.5(b). The unlawful sexual penetration supports the 667(a).

“THE COURT: It looks like they have a similar 654 statute to me.

“[Prosecutor]: There was no indication that –

THE COURT: It’s the same exact case number. It was one prison sentence.

“[Prosecutor]: And there were two victims.

“THE COURT: All right. The defendant’s application for probation is denied”

The court then began to pronounce judgment. When subsequently striking one of the prior prison term enhancements, the court stated, “The *other* 667.5(b) allegation, the punishment is stricken in the interest of justice. [emphasis added]” Given that the prior prison term associated with the Oregon conviction for attempted sexual abuse was discussed most recently, the context shows that the “other 667.5(b) allegation” would refer to the grand theft prison term.

After briefing was completed in this case, the California Supreme Court settled these issues in *Anzalone, supra*, 56 Cal.4th 545. For our purposes, it is sufficient to note that *Anzalone* held that “a defendant who does not object to the trial court’s failure to comply with section 1149 forfeits the argument that the trial court erred.” (*Id.* at p. 551)

Here, defendant did not object in the trial court, and thereby forfeited any claim of section 1149 error. (*Anzalone, supra*, 56 Cal.4th 545.)

II.

THERE WAS INSUFFICIENT EVIDENCE THAT DEFENDANT’S 2006 OREGON CONVICTION WAS A SERIOUS FELONY UNDER CALIFORNIA LAW

Defendant argues, and the People concede, that there is insufficient evidence to support the trial court’s finding that defendant’s 2006 Oregon conviction for attempted unlawful sexual penetration was a serious felony under California law. We agree.

A conviction in another jurisdiction will qualify as a serious felony if California punishes the offense with imprisonment in state prison, and the offense “includes all of the elements of a particular violent felony as defined in subdivision (c) of Section 667.5 or serious felony as defined in subdivision (c) of Section 1192.7.” (§ 667, subd. (d)(2).) There are two ways to establish a foreign conviction as a serious felony. If the statutory definition of the foreign crime contains all of the necessary elements to meet California’s definition of a serious felony, then the foreign crime is a serious felony. (*People v. Crane* (2006) 142 Cal.App.4th 425, 433.) Or, if the admissible evidence in the record of the foreign conviction shows that the underlying conduct would have constituted a qualifying offense in California, then the foreign crime is a serious felony. (*Ibid.*)

Here, the trial court found that defendant’s Oregon conviction was analogous to a conviction under section 289, subdivision (a). However, neither the statutory elements of the Oregon crime, nor the record of the Oregon conviction, establish the requirements for

deeming a foreign conviction a serious felony under section 667. (§ 667, subds. (a)(1) & (d)(2).)

A. *The Oregon Version of the Crime Does Not Contain All of the Necessary Elements to Meet California's Definition of Penetration With a Foreign Object*

California's version of penetration with a foreign object requires a specific intent to accomplish "sexual arousal, gratification, or abuse." (§ 289, subd. (k)(1). See also *People v. Senior* (1992) 3 Cal.App.4th 765, 776.) Oregon's version contains no such element. (See O.R.S. § 163.411.) The Oregon statute states:

"(1) Except as permitted under ORS 163.412, a person commits the crime of unlawful sexual penetration in the first degree if the person penetrates the vagina, anus or penis of another with any object other than the penis or mouth of the actor and:

- "a. The victim is subjected to forcible compulsion;
- "b. The victim is under 12 years of age; or
- "c. The victim is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness.

"(2) Unlawful sexual penetration in the first degree is a Class A felony."
(O.R.S. § 163.411.)

By its plain language, the statute contains no specific intent requirement. In contrast, other Oregon sex crime statutes do include a specific intent requirement. (See, e.g., O.R.S. §§ 163.427, subd. (b) & 163.415, subd. (b).) Because the Oregon Legislature clearly knew how to draft sex crime statutes with specific intent requirements, we can reasonably infer that its failure to include such a requirement in O.R.S. § 163.411 was intentional. (See *In re Eddie M.* (2003) 31 Cal.4th 480, 495. See also *Royal Aloha Partners v. Real Estate Div.* (1982) 59 Or.App. 564, 569 [noting that had the legislature intended a particular statutory effect, it could have worded the statute differently to accomplish that effect].)

We note that defendant pled to *attempted* unlawful sexual penetration in violation of O.R.S. § 163.411. But this does not change the effect of the discrepancy between the intent requirements in the California and Oregon versions of the predicate offenses. California’s section 289 requires that a defendant commit an act of “sexual penetration” (§ 289, subd. (a)), which is a penetration done “for the purpose of sexual arousal, gratification, or abuse.” (§ 289, subd. (k)(1).) To be guilty of attempt under California law, “a defendant must harbor the specific intent to accomplish all elements of the completed offense” (*People v. Bright* (1996) 12 Cal.4th 652, 687, overruling on another ground recognized by *People v. Seel* (2004) 34 Cal.4th 535, 541. See also § 21a.) Thus, to be guilty of attempted forcible penetration in California, the defendant would need to harbor specific intent to penetrate the victim “for the purpose of sexual arousal, gratification or abuse.” (§ 289, subd. (k)(1).)

Attempted unlawful sexual penetration in Oregon would not require this type of intent. In Oregon, “[a]n attempt to commit the crime requires only that the defendant intentionally engage in conduct constituting a substantial step towards the commission of the crime.” (*State v. Sears* (1984) 70 Or.App. 537, 539.) Thus, under Oregon law, a defendant could commit attempted unlawful sexual penetration without acting with the purpose of “sexual arousal, gratification, or abuse,” as required under California law.

Because Oregon’s version of the crime does not contain all of the necessary elements to meet California’s definition of attempted penetration with a foreign object, we must continue to the second step of our analysis. We now look to the admissible evidence in the record of the foreign conviction to determine whether the underlying conduct would have constituted a qualifying offense in California. (*People v. Crane, supra*, 142 Cal.App.4th at p. 433.)

B. The Record of the Foreign Conviction Does Not Establish that the Underlying Conduct Would Have Constituted the Qualifying Offense of Penetration with a Foreign Object Under California Law

Defendant pled guilty to the Oregon charge of attempted unlawful sexual penetration. The plea form indicates that the factual basis for the plea was the “DA Indictment.”⁴ The pertinent unlawful sexual penetration count in the indictment reads: “COUNT 3 [¶] The defendant, on or about April 11, 2006, in Jackson County, Oregon, did unlawfully and intentionally, by forcible compulsion, attempt to penetrate the vagina of [the victim], with an object, to – wit: defendant’s finger[.]”⁵ This language does not indicate that the penetration was performed “for the purpose of sexual arousal, gratification, or abuse,” which is required to establish a violation under California law. (See § 289, subd. (k)(1).)

Neither the elements of the foreign crime, nor the record of the foreign conviction establish that defendant committed a serious felony under section 667, subdivision (d)(2). The trial court’s finding to the contrary was error.

III.

**DEFENDANT DOES NOT ESTABLISH REVERSIBLE
INEFFECTIVE ASSISTANCE OF COUNSEL**

Defendant next argues that none of the factors cited by the sentencing judge were proper grounds for imposing an aggravated sentence, and his counsel’s failure to object thereto was ineffective assistance.⁶

⁴ In actuality, defendant was charged by way of a grand jury indictment.

⁵ The following writing appears on count 3 of the indictment: a handwritten line beginning below the word “on” and ending above the word “or”. At the end of the line, the word “attempt” is written, which appears to have been subsequently crossed out.

⁶ Given our disposition of this appeal, *post*, there is a possibility defendant will be resentenced and this issue mooted. However, in the interest of judicial economy, we resolve this issue now. If the prosecution elects to retry the prior strike allegation and prevails, this sentencing issue will remain relevant.

Defendant contends that the trial court improperly used the same conviction to impose sentence enhancements and an aggravated sentence on the substantive charge. Defendant argues that “when the trial court stressed that appellant had been out of prison for 12 days when he committed the crime ... [it] amounted to punishing appellant yet again for his recidivism and therefore was a prohibited ‘dual use’....”

However, when the trial court stated that defendant “was barely out of prison when he committed this new offense,” it was not relying on the prior conviction as a basis for aggravation. Rather, the court was relying on the temporal proximity between defendant’s release from prison and his commission of a crime. “Nothing in the rules prohibits the court from relying upon the relationship of the prior conviction to the present offense as an aggravating consideration, even where the fact of the offense itself could not be used.” (*People v. Pinon* (1979) 96 Cal.App.3d 904, 911.)

Moreover, parole status is an aggravating factor distinct from prior convictions or prior prison terms. (*People v. Yim* (2007) 152 Cal.App.4th 366, 369. See also *People v. Jerome* (1984) 160 Cal.App.3d 1087, 1098-1099.)

Defendant relies on our decision in *People v. McFearson* (2008) 168 Cal.App.4th 388 (*McFearson*), in claiming an erroneous dual use of facts occurred here. *McFearson* is distinguishable. In *McFearson*, the trial court used the same prior conviction to both impose an aggravated sentence and enhance the defendant’s sentence by one year under section 667.5, subdivision (b). (*McFearson, supra*, 168 Cal.App.4th at p. 395.) Conversely, “[h]ere, the trial court imposed the upper term based not on appellant’s prior prison term, but on his status as a parolee and his unsatisfactory performance on parole....” (*People v. Yim, supra*, 152 Cal.App.4th at p. 369.)

A. *Any Error in Relying on the Recency of Defendant’s Release from Prison Before Commission of New Crime is Subject to Harmless Error Review*

Even if it had been error for the court to cite this particular ground for aggravation, any such error was harmless. The consideration of improper factors is not necessarily

fatal to a sentence. (*People v. Price* (1991) 1 Cal.4th 324, 492, called into doubt on other grounds by *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1165.) “When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper. [Citation.]” (*People v. Price, supra*, 1 Cal.4th at p. 492.)

And, a single factor in aggravation is sufficient to justify a sentencing choice. (*People v. Brown* (2000) 83 Cal.App.4th 1037, 1043.)

Here, the trial court relied on at least three proper aggravating factors: defendant posed a danger to society, defendant was on parole when the violation occurred and defendant performed unsatisfactorily on parole. (Cal. Rules of Court, rule 4.421 (b)(1) & (b)(4) & (b)(5).)

B. Rule 4.421(b)(1) Factor

At sentencing, the trial court stated that defendant was a danger to the community. Defendant contends that the trial court’s reliance on the “danger to the community” factor (Cal. Rules of Court, rule 4.421 (b)(1)) was improper. He contends that “[o]ne could argue that anyone convicted of a felony is a ‘danger to the community.’ ”

First, we note that defendant’s argument would apply to anyone sentenced to an upper term under rule 4.421 (b)(1). Thus, defendant’s contention is a facial attack on the propriety of the danger-to-society factor altogether. He is essentially suggesting that danger-to-society should not be a factor because the prosecution simply points to the fact that the defendant before the sentencing judge is, by definition, a felon. But, absent some constitutional infirmity, we have no occasion to pass on the wisdom of sentencing factors properly established pursuant to legislative directive. As we explained in *People v. Cooper* (1996) 43 Cal.App.4th 815:

“The choice of fitting and proper penalty is not an exact science but a legislative skill involving an appraisal of the evils to be corrected, the

weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will.... Thus, the judiciary should not interfere in the process unless a statute prescribes a penalty ‘ “out of all proportion to the offense.” ’ [Citation.]” (*Id.* at p. 827.)

The Judicial Council’s inclusion of the danger-to-society factor in the rule 4.421 list was the type of sentencing-related policy decision with which we will not interfere. The Judicial Council acted pursuant to express authority from the Legislature. (§ 1170.3, subd. (a)(2).) Our Supreme Court has already determined this delegation of power was constitutional. (See generally *People v. Wright* (1982) 30 Cal.3d 705.) Thus, the trial court’s consideration of these sentencing factors promulgated by the Judicial Council – including the danger-to-society factor – was not only permissible, it was mandatory. (See § 1170, subd.(a)(3) [“In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council.”]; *People v. Wright, supra*, 30 Cal.3d at p. 710 [“The Judicial Council adopted Sentencing Rules for the Superior Courts. [Citations.] The trial court *must* consider the criteria enumerated in the rules” (Italics added.)]) It was not error for the court to consider this sentencing factor.

Not only was the court’s evaluation of this factor appropriate, its resultant conclusion was as well. Contrary to the suggestion implicit in defendant’s argument, there is no indication that the trial court’s reliance on the danger-to-society factor was based merely on the fact that defendant had committed *any* felony. To the contrary, the court stated: “[H]e’s a danger to the community. He’s out for twelve days and *he’s chasing somebody around with a piece of glass.*” (Italics added.) The court cited the specific circumstances of defendant’s offense in determining he presented a danger to society. The trial court did not abuse its discretion in concluding defendant posed a danger to society.

C. The Court's Citation to Defendant's Danger to the Community was not too Vague and Editorial to Have Meaning

Defendant also argues that the court's "reference to a 'danger to the community' " is "too vague and editorial to have meaning." But the trial court did not simply utter the phrase "danger to the community" and proceed to pronounce the sentence. The court stated: "... he's a danger to the community. *He's out for twelve days and he's chasing somebody around with a piece of glass.* [¶] I am going to order the aggravated term of eight years on that basis" (Italics added.) Thus, the court unambiguously explained why it believed the defendant was a danger to society.

D. Rule 4.421(b)(4) and (b)(5) Factors

Defendant argues that "the trial court's actual reasons for imposing the upper term when sentencing appellant did not refer to appellant being on parole." But, at the sentencing hearing, the trial court stated: "According to the probation report, he'd been out on parole for something like twelve days and he committed a new crime. To me, that's aggravated."⁷ Defendant does not explain why this does not qualify as one of the trial court's "actual reasons." The sentencing judge stated in "simple language" the "factors that support the exercise of discretion." (Rules of Court, rule 4.406(a).) He did so "orally on the record." (*Ibid.*) "Defendant does not point out why this statement was inadequate nor does he explain what more, in his view, the [Rules of Court] demand[]." (*People v. Pinon, supra*, 96 Cal.App.3d at p. 910.)

DISPOSITION

The judgment is reversed to the extent it is based on a finding that defendant's July 19, 2006, Oregon conviction was a prior serious felony conviction and strike. In all other respects, the judgment is affirmed. On remand, the prosecution may retry the

⁷ A defendant's unsatisfactory performance on parole can be proven by evidence that he committed a crime while on parole, and was convicted. (*People v. Towne* (2008) 44 Cal.4th 63, 82.)

affected allegation if it so chooses. (*People v. Roberts* (2011) 195 Cal.App.4th 1106, 1133-1134.) The prosecution shall have 30 days after the remittitur is filed in which to give notice of its intent to seek retrial of the prior conviction allegation. If the prosecution gives such notice, the court shall conduct further proceedings in accordance with this opinion. If the prosecution fails to give such notice, or if the prior conviction is not proven on retrial, the court shall resentence defendant. (See *People v. Henley* (1999) 72 Cal.App.4th 555, 566-567.)