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

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT MORENO CALDERA,

Defendant and Appellant.

F069717

(Super. Ct. No. F11906748)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell, Judge.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

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\*Before Levy, Acting P.J., Detjen, J. and Peña, J.

## INTRODUCTION

A jury convicted defendant Robert Moreno Caldera of attempted voluntary manslaughter (Pen. Code, § 664, 192, subd. (a), count 1),<sup>1</sup> assault with a deadly weapon, a knife (§ 245, subd. (a)(1), count 2), and inflicting injury on a former cohabitant resulting in a traumatic condition (§ 273.5, subd. (a), count 3). In addition, the jury also found true enhancement allegations that defendant personally inflicted great bodily injury upon the victim (§ 12022.7) in connection with counts 2 and 3, and personally used a dangerous and deadly weapon (§ 12022, subd. (b)(1)) in the commission of count 3.

In a bifurcated hearing, the trial court found true the allegations that defendant suffered two prior “strike” convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and one prior serious felony conviction (§ 667, subd. (a)(1)). Defendant was sentenced to an aggregate prison term of 34 years to life.

On appeal, defendant contends the trial court’s true finding on one of his prior strike convictions should be reversed for insufficient evidence. In 1997, defendant pleaded no contest to two counts of aggravated assault (§ 245, subd. (a)(1)) in the same court case. Section 245, subdivision (a)(1) punishes assault committed either by means likely to produce great bodily injury or by use of a deadly weapon other than a firearm. Only the latter method qualifies as a serious felony within the meaning of the three strikes law.

Defendant challenges the trial court’s finding on the second count. He alleges the evidence was insufficient to sustain a finding the prior strike offense was an assault in which defendant personally used a dangerous or deadly weapon. We disagree, and affirm the judgment.

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<sup>1</sup>All undefined statutory citations are to the Penal Code unless otherwise indicated.

## **FACTS AND PROCEDURAL HISTORY**

### ***Prosecution's Case***

Defendant and Eugenia Reynolds were in a two-and-a-half-year relationship. The couple lived together in an apartment in Fresno until they ended their relationship in November 2011.

On November 23, 2011, defendant was moving Reynold's belongings into her friend's apartment when he and Reynolds began arguing. During the argument, defendant told Reynolds "it was a beautiful day to die," locked the door to the apartment, and started hitting Reynolds in the face. When Reynolds punched him back, defendant stabbed her twice in the stomach with a paring knife and slashed her across the neck. Reynolds also sustained cuts to her hands trying to defend herself.

According to Reynolds, when police arrived, defendant was holding the plastic handle of the knife while the blade was still stuck in Reynolds' hand. However, a Fresno police officer who responded to the incident testified defendant was holding the blade of the knife when he arrived.

### ***Defense's Case***

Defendant testified in his own defense at trial. Defendant stated he and Reynolds broke up on November 16, 2011. That same day, Reynolds told defendant she would kill him. Defendant changed the locks to his apartment as a result of the threat.

On the day of the incident, Reynolds threw a cast iron skillet at defendant. Defendant claimed Reynolds also pulled a knife on him and told him, "If I can't have you, no one's going to have you." Defendant stated Reynolds moved toward him with the paring knife and he punched her in the face. Reynolds came after defendant with the knife again, and he grabbed it from her to stop the attack. According to defendant, he stabbed Reynolds to defend himself.

## ANALYSIS

### 1. Defendant's Prior Strike Offense Is Supported by Substantial Evidence

Under the three strikes law, a prior conviction is a “serious felony” that counts as a strike for sentence enhancement purposes if it is a crime listed in section 1192.7, subdivision (c). (§ 667, subd. (d)(1).) Defendant contends the People presented insufficient evidence to support the trial court’s finding that one of his two 1997 convictions for aggravated assault (§ 245) was a serious felony. We disagree.

The People have the burden ““to prove beyond a reasonable doubt those alleged prior convictions challenged by a defendant.”” (*People v. Bueno* (2006) 143 Cal.App.4th 1503, 1507.) We review the record in the light most favorable to the judgment to determine whether it is supported by substantial evidence. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1067 (*Delgado*).) “In other words, we determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt.” (*Ibid.*)

In 2011, former section 245, subdivision (a)(1) provided, in relevant part: “Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished ....” Thus, former section 245, subdivision (a)(1) described two ways of committing aggravated assault within the *same* subdivision. First, by use of a deadly weapon or instrument other than a firearm. Second, by means of force likely to produce great bodily injury.

In 2012, the Legislature amended section 245 by deleting the phrase “or by any means of force likely to produce great bodily injury” from subdivision (a)(1) and placed it in newly enacted subdivision (a)(4). (Stats. 2011, ch. 183, § 1.) The amendment separated the two ways in which an assault under the statute could occur.

Assault with a deadly weapon is a serious felony and constitutes a strike under the three strikes law. (§§ 1192.7, subd. (c)(31), 667, subd. (d)(1), 1170.12, subd. (b)(1)).

However, assault by means of force *likely* to produce great bodily injury, without actually *causing* great bodily injury, is not a strike. (*Delgado, supra*, 43 Cal.4th at p. 1065.) As a result of the pre-2012 version of section 245, subdivision (a)(1), a trial court cannot determine whether a conviction for aggravated assault occurring before 2012 is a strike based solely on the conviction itself. To do so, the entire record of conviction must be examined. (*Delgado, supra*, at p. 1065.)

To aid the prosecution in determining whether a prior conviction is a strike in a multi-clause statute, the Legislature enacted section 969f. Section 969f provides the following, in pertinent part: “(a) Whenever a defendant has committed a serious felony as defined in subdivision (c) of Section 1192.7, the facts that make the crime constitute a serious felony may be charged in the accusatory pleading.... 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.”

The purpose of a section 969f admission is to qualify a crime as a serious felony. (*People v. Leslie* (1996) 47 Cal.App.4th 198, 204.) If a defendant makes a section 969f admission as part of a guilty plea, he or she concedes an offense is a serious felony, and “the serious felony nature of the offense will become an explicit part of the record of conviction, leaving no room for confusion if and when the issue becomes relevant to the sentence for a subsequent felony.” (*Delgado, supra*, 43 Cal.4th at p. 1072.)

Here, the trial court determined defendant has two prior strikes based on two 1997 convictions arising from the same case, both for violating section 245, subdivision (a)(1). The parties agree count 1 constitutes a strike. We agree as well. The section 12022.7 great bodily injury enhancement attached to count 1 shows it is an assault in which defendant personally inflicted great bodily injury—a strike under the three strikes law. (§ 1192.7, subd. (c)(8).) Thus, the only issue is whether substantial evidence supports the trial court’s finding that count 2 is also a strike.

The judgment of conviction indicates count 2 was for “ADW W/FORCE LIKELY TO PROD GBI.” No great bodily injury enhancement was attached to count 2. The notation on count 2 could mean either the conviction was for assault with a deadly weapon, a strike offense, or an assault by means likely to produce great bodily injury, which is not a strike. However, the change of plea form pursuant to defendant’s 1997 convictions indicates he made a “969f admission in Ct. 2.” Defendant’s section 969f admission makes clear that count 2 is, indeed, a strike because he admitted the offense is a serious felony within the meaning of section 1192.7, subdivision (c).

Defendant contends the admission is insufficient to prove count 2 was a strike because “section 969f itself says nothing about whether the prior offense is a serious or violent felony conviction.” We are perplexed by this argument because the very purpose of section 969f is to qualify a crime as a serious felony. (*People v. Leslie, supra*, 47 Cal.App.4th at p. 204.) By virtue of the fact defendant made a section 969f admission, we may conclude count 2 is a serious felony because a section 969f admission *requires* the defendant to admit or deny a prior serious felony allegation. (*Leslie*, at p. 204.)

In his reply brief, defendant also asserts the prosecution was required to present either the accusatory pleading or the plea colloquy to prove count 2 was a strike. He contends: “[W]here the accusatory pleading specifies facts which make the offense a prior serious felony, and the defendant separately admits it as part of a guilty plea, the documents will prove the prior conviction because it will reference the underlying conduct.” In support of his assertion that a conviction may only be proven if it references the underlying conduct, defendant cites to our Supreme Court’s decision in *Delgado*. However, defendant’s reliance on *Delgado* is misplaced.

Delgado was convicted of various offenses. The information alleged he had suffered a prior strike conviction for violation of section 245, subdivision (a)(1). (*Delgado, supra*, 43 Cal.4th at p. 1064.) Because a violation of section 245, subdivision (a)(1) could be committed in a way that would not constitute a serious felony under the

three strikes law, i.e., by committing an assault by means likely to produce great bodily injury, the prosecution had to prove the prior offense was a strike.

The issue before our Supreme Court was whether the abstract of judgment adequately identified the crime committed by Delgado as assault with a deadly weapon and not assault by means likely to produce great bodily injury. (*Delgado, supra*, 43 Cal.4th at p. 1064.) The court stated, “[I]f the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense.” (*Id.* at p. 1066.)

The *Delgado* court explained an abstract of judgment may be sufficient to prove a prior conviction was a serious felony if the description of the crime in the abstract of judgment adequately describes how the crime was committed. However, where the description is so ambiguous the court cannot determine the manner in which the statute was violated, the abstract of judgment does not constitute substantial evidence of the precise factual nature of the prior conviction. (*Delgado, supra*, 43 Cal.4th at p. 1069.) The court held the abstract of judgment, which described the crime as “Asslt w DWpn,” was sufficient. The parties agreed this language stood for “assault with a deadly weapon,” the manner of assault that was a serious crime. (*Id.* at pp. 1069.)

Here, while the abstract of judgment does not adequately reference the underlying conduct as the judgment did in *Delgado*, the prosecution presented evidence defendant made a section 969f admission. Although a section 969f admission was not made by Delgado, our Supreme Court encouraged use of this procedure, explaining it permits “the serious felony nature of the offense [to] become an explicit part of the record of conviction, leaving no room for confusion if and when the issue becomes relevant to the sentence for a subsequent felony.” (*Delgado, supra*, 43 Cal.4th at p. 1072.) The prosecution was, therefore, not required to show how defendant’s 1997 prior offense in

count 2 was committed, because his section 969f admission makes clear the offense was a serious felony.

If we were to require the prosecution to produce the plea colloquy or information despite defendant's section 969f admission, as defendant urges this court to do, it would contravene the purpose of section 969f. The Legislature's express purpose in enacting section 969f was "to avoid requiring a prosecutor to reprove [*sic*] a previous conviction when it is alleged that a defendant has a prior serious felony conviction." (*People v. Leslie, supra*, 47 Cal.App.4th at p. 204.) Although some circumstances may require production of the information or a plea colloquy, such as where it is unclear whether a section 969f admission was proper, defendant does not challenge the validity of the section 969f admission here.<sup>2</sup> We conclude substantial evidence supports the trial court's finding that count 2 of defendant's prior conviction for aggravated assault was a strike within the meaning of the three strikes law.

## **2. The Abstract of Judgment Must Be Corrected**

Defendant contends the abstract of judgment supporting his instant convictions must be corrected because (1) the judgment describes the conviction in count 3 as "SPOUSAL ABUSE," where it should be described as "corporal injury-domestic"; and, (2) the abstract states the sentences imposed in counts 1 and 2 were both "concurrent" and "stayed," when the judgment should only reflect the sentences were stayed and not imposed concurrently.

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<sup>2</sup>Defendant also contends his record of conviction does not contain an allegation relating to firearm use or the personal infliction of great bodily injury in connection with his prior conviction in count 2 for aggravated assault. He argues the absence of these allegations supports the conclusion count 2 was actually a conviction for assault by means of force likely to produce great bodily injury, which is not a strike offense.

As noted, a strike resulting from an aggravated assault may also be based on the use of a deadly weapon other than a firearm. In any event, given defendant's section 969f admission, we would not conclude the absence of such allegations constitutes conclusive evidence defendant's prior offense was not a strike.

The Attorney General agrees and adds that the abstract of judgment should also be corrected to include the jury's true finding on the section 12022.7, subdivision (e) enhancement in connection with count 2. The sentence pursuant to this enhancement was stayed. We agree and will order the judgment modified accordingly.

#### **DISPOSITION**

The trial court is ordered to prepare an amended abstract of judgment with service to all appropriate agencies to reflect the following modifications: The crime in count 3 must be amended from "SPOUSAL ABUSE" to "corporal injury-domestic." The sentences pursuant to counts 1 and 2 are to be marked "stayed," rather than "stayed" and "concurrent." A section 12022.7, subdivision (e) enhancement attached to count 2 must be added with an indication the sentence associated with this enhancement is stayed.

In all other respects, the judgment is affirmed.