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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

KAMARI JAMAAL NELSON,

Defendant and Appellant.

H037688

(Santa Clara County

Super. Ct. No. 211266)

This is the second appeal for defendant Kamari Jamaal Nelson who was convicted of 10 counts of sexual assault and related felonies. He was initially sentenced to 164 years to life in prison. In the first appeal we concluded that the evidence was insufficient to support a finding that defendant had suffered a prior conviction that qualified as a serious felony for purposes of the Three Strikes law (Pen. Code, § 667, subds. (b)-(i))¹ and the five-year enhancement of section 667, subdivision (a) (section 667(a)). We reversed and remanded for retrial of the prior conviction allegation and for resentencing. (*People v. Nelson* (Nov. 2, 2010, H034344) nonpub. opn.)

On remand, the trial court found that the prior conviction was a serious felony and resentenced defendant to a determinate term of 60 years and two consecutive indeterminate terms pursuant to section 667.61. In calculating the sentence the trial court added the section 667(a) enhancement to the aggregate determinate term and to each of

¹ Hereafter all unspecified statutory references are to the Penal Code.

the two indeterminate terms. Defendant challenges the retrial on double jeopardy grounds and argues that the trial court erred in applying the section 667(a) enhancement three times. We reject the arguments and affirm.

I. BACKGROUND

The facts of the crimes are unnecessary to recount in detail. It suffices to say that defendant made arrangements with two female prostitutes who had advertised their services on Craigslist. The women met with defendant at his residence expecting a consensual, sex-for-pay transaction. Instead, defendant became physically violent and threatening and forced them to perform sex acts and engage in other conduct against their will. Prior to the attacks he confiscated their cell phones, depriving them of any means to call for help. He also took what little of value they had, including, as to one victim, everything she owned. The jury convicted him of the 10 counts charged in the indictment:

Count 1, first degree robbery (§§ 211, 212.5, subd. (a)).

Count 2, aggravated oral copulation (§ 288a, subd. (c)(2)).

Count 3, assault with intent to commit rape (§ 220, subd. (a)).

Count 4, aggravated sexual penetration (§ 289, subd. (a)(1)).

Count 5, assault with intent to commit rape (§ 220, subd. (a)).

Count 6, aggravated sexual penetration (§ 289, subd. (a)(1)).

Count 7, kidnapping (§ 207, subd. (a)).

Count 8, first degree robbery (§§ 211, 212.5, subd. (a)).

Count 9, aggravated oral copulation (§ 288a, subd. (c)(2)).

Count 10, second degree robbery (§§ 211, 212.5, subd. (c)).

The indictment carried multiple sentencing enhancements relating to defendant's use of a knife or a gun (§§ 12022, 12022.3, 12022.5, 12022.53) and his sexual assault of more than one victim in the case (§ 667.61, subs. (b) & (e)). The indictment also alleged one prior serious felony (§ 667(a)) and one prior strike (§ 667, subs. (b)-(i)).

Both prior conviction allegations were based upon defendant's 2002 conviction under former section 245, subdivision (a)(1), which made it a crime to commit assault with a deadly or dangerous weapon or with force likely to produce great bodily injury (GBI).²

Assault with a deadly or dangerous weapon is a serious felony for purposes of both the Three Strikes law and the section 667(a) enhancement; assault with force likely to produce GBI is not. (§ 1192.7, subd. (c)(23).) The evidence submitted at the first trial in support of the prior conviction allegation was sufficient to prove that defendant had pleaded no contest to former section 245, subdivision (a)(1) but it was insufficient to prove that he had pleaded to the serious felony form of the crime. On retrial, the prosecution introduced the reporter's transcript of the change of plea hearing in the prior case, which the trial court found to establish that defendant had been convicted of assault with a deadly weapon, a serious felony. Thereafter, a jury found the prior conviction allegation to be true.

The trial court resentenced defendant to a determinate term of 60 years. The aggregate term was calculated pursuant to section 1170.1 and included terms for all counts except counts 2 and 9. Each of the terms was doubled under the Three Strikes law as required when a defendant has one prior strike conviction. (§ 667, subd. (e)(1).) The court added five years to the aggregate term for the section 667(a) enhancement. The court also imposed consecutive indeterminate terms for counts 2 and 9. As to count 2, the court sentenced defendant to 50 years to life, double the minimum term called for under section 667.61, subdivision (a), plus five years for the section 667(a) enhancement. And on count 9, the court imposed a term of 30 years to life, which is double the

² Section 245 was amended in 2011 so that the crime of assault with force likely to produce GBI now appears in a separate subdivision. (§ 245, subd. (a)(4); see Stats. 2011 (2011 Reg. Sess.) ch. 183 § 1, p. 2287.)

minimum term called for by section 667.61, subdivision (b). The court added another section 667(a) enhancement to that term as well. This timely appeal followed.

II. DISCUSSION

A. Double Jeopardy

“The double jeopardy clauses of the Fifth Amendment to the United States Constitution and article I, section 15, of the California Constitution provide that a person may not be twice placed ‘in jeopardy’ for the ‘same offense.’ ” (*People v. Anderson* (2009) 47 Cal.4th 92, 103 (*Anderson*); see also, *North Carolina v. Pearce* (1969) 395 U.S. 711, 717.) Double jeopardy principles prohibit a second trial following an acquittal or when a conviction is reversed because of insufficient evidence. (*Anderson, supra*, at p. 104.) Defendant argues that permitting retrial of the prior conviction allegation was a violation of these rules. The argument is defeated by *Monge v. California* (1998) 524 U.S. 721, 734 and *People v. Monge* (1997) 16 Cal.4th 826, which squarely hold that double jeopardy protections do not apply to prior conviction enhancement allegations.

Defendant argues that the *Monge* cases have been undermined by *Apprendi v. New Jersey* (2000) 530 U.S. 466, and the line of cases following it. Defendant acknowledges that his attorney did not raise a double jeopardy objection below but he does not claim that his attorney provided ineffective assistance; given the state of the law, an objection would have been futile. Defendant also recognizes that, as an intermediate appellate court, we are bound by the *Monge* cases. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.) He makes the argument here in order to preserve it for review by the United States Supreme Court. Accordingly, we reject the contention that retrial of the prior conviction allegation was barred by double jeopardy principles.

B. The Section 667(a) Enhancement

Defendant argues that the trial court was bound to apply the five-year enhancement of section 667(a) one time only. Defendant relies upon *People v. Tassell* (1984) 36 Cal.3d 77 (*Tassell*) (overruled on unrelated grounds in *People v. Ewoldt* (1994)

7 Cal.4th 380, 401). At the time *Tassell* was decided, former section 1170.1 provided, in pertinent part: “[W]hen any person is convicted of two or more felonies . . . and a consecutive term of imprisonment is imposed under Sections 669 and 1170, the aggregate term of imprisonment for all such convictions shall be the sum of the principal term, the subordinate term and any additional term imposed pursuant to Section 667.5, 667.6, or 12022.1. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any enhancements imposed pursuant to Section 12022, 12022.3, 12022.5, 12022.6, 12022.7, or 12022.8. The subordinate term for each consecutive offense which is not a ‘violent felony’ . . . shall consist of one-third of the middle term . . . and shall exclude any enhancements. . . . The subordinate term for each consecutive offense which is a ‘violent felony’ . . . shall consist of one-third of the middle term . . . and shall include one-third of any enhancements imposed pursuant to Section 12022, 12022.5 or 12022.7.” (Former section 1170.1, subd. (a); see Stats. 1982 (1981-1982 Reg. Sess.) ch. 1551, § 1.5, p. 6048.)³

³ Section 1170.1, subdivision (a) has since been amended and presently reads in full as follows: “Except as otherwise provided by law, and subject to Section 654, when any person is convicted of two or more felonies, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same or by a different court, and a consecutive term of imprisonment is imposed under Sections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses. Whenever a court imposes a term of imprisonment in the state prison, whether the term is a principal or subordinate term, the aggregate term shall be served in the state prison, regardless as to whether or not one of the terms specifies imprisonment in the county jail pursuant to subdivision (h) of Section 1170.”

The foregoing language, *Tassell* held, “makes it very clear that enhancements for prior convictions do not attach to particular counts but instead are added just once as the final step in computing the total sentence.” (*Tassell, supra*, 36 Cal.3d at p. 90.) *Tassell* observed that former section 1170.1 treated two kinds of enhancements differently. The first kind of enhancement is the one typified by sections 667.5 and 667.6, which concern prior convictions, and section 12022.1, which provides additional punishment for crimes committed while released on bail. These are the so-called status enhancements; they relate to the status of the offender. The second type, typified by sections 12022, 12022.5, and 12022.7, relates to the nature of the offense. “Enhancements of the second kind enhance the several counts; those of the first kind, by contrast, have nothing to do with particular counts but, since they are related to the offender, are added only once as a step in arriving at the aggregate sentence.” (*Tassell, supra*, at p. 90.)

Tassell does not aid defendant because it does not apply to indeterminate terms imposed under the Three Strikes law. In *People v. Williams* (2004) 34 Cal.4th 397 (*Williams*), the defendant had two prior strike convictions, which mandated an indeterminate term of 25 years to life for the crimes of which he was convicted. The trial court sentenced him to two consecutive terms of 25 years to life and added section 667(a) enhancements to each indeterminate term. (*Williams, supra*, at pp. 400-401.) The defendant challenged the multiple enhancements citing *Tassell*. *Williams* rejected the challenge.

Williams distinguished *Tassell* on several points. *Williams* first noted that *Tassell* had relied upon the language of section 1170.1, which directs the sentencing court to calculate multiple determinate terms in a particular manner. That calculation has no application to third strike sentences. (*Williams, supra*, 34 Cal.4th at p. 402.) In the third strike context, the defendant is always subject to an indeterminate life term which must be imposed consecutive to any other term for which a consecutive term may be imposed. (*Id.* at p. 404; § 667, subd. (e)(2).) Moreover, the term, as enhanced by the Three Strikes

law, must be “in addition to any other enhancement or punishment provisions which may apply.” (§ 667, subd. (e); *Williams, supra*, at p. 404.)

Williams noted that the section 667(a) enhancement was added by initiative in 1982, the intent of which was to increase the sentence for repeat offenders. “Adding the five-year enhancement separately to the third strike sentence for each new serious felony conviction is not inconsistent with this intent.” (*Williams, supra*, 34 Cal.4th at p. 404.) *Williams* also pointed out that adding the five-year enhancement to the sentence for each new serious felony conviction is consistent with the logic of the Three Strikes law, which “uses a defendant’s status as a recidivist to *separately* increase the punishment for *each* new felony conviction.” (*Ibid.*) For example, where a defendant is convicted with one prior strike, the term for *each* new felony conviction is doubled. Where the defendant has two prior strikes, the term for *each* new felony is an indeterminate life term. (*Ibid.*, citing § 667, subd. (e)(1), (2).) In sum, “The Three Strikes law, unlike section 1170.1, does not draw any distinction between status enhancements, based on the defendant’s record, and enhancements based on the circumstances of the current offenses, and the Three Strikes law generally discloses an intent to use the fact of recidivism to separately increase the sentence imposed for each new offense. Accordingly we conclude that, under the Three Strikes law, section 667(a) enhancements are to be applied individually to each count of a third strike sentence.” (*Williams, supra*, at pp. 404-405.)

Defendant argues that *Williams* stands for the narrow proposition that the section 667(a) enhancement may be used multiple times only when indeterminate terms are imposed as the result the Three Strikes law. This is a second strike case. The indeterminate terms were imposed pursuant to section 667.61. Defendant argues that we should, therefore, revert to the rule that status enhancements are applied only once. Defendant points to *People v. Johnson* (2002) 96 Cal.App.4th 188, 200 (*Johnson*), in which the appellate court noted that status enhancements are usually added to the overall sentence as opposed to being made part of the term for the individual crimes. But the

issue in *Johnson* was whether the defendant's prior conviction could be used to sentence him under the One Strike law and to impose an additional five years under section 667(a). (*Johnson, supra*, at p. 198.) The case did not concern the question before us. In any event, we do not read *Williams* as narrowly as defendant does.

The pertinent analysis is that set forth in *People v. Misa* (2006) 140 Cal.App.4th 837 (*Misa*), upon which the Attorney General relies. In *Misa*, the defendant had one prior strike. He was convicted of one count of torture and two counts of assault with a deadly weapon. The trial court imposed an indeterminate sentence on the torture count and a consecutive determinate sentence for the assaults. The court applied a section 667(a) enhancement to the determinate term and also to the indeterminate term. On appeal, the defendant challenged the double counting of the enhancement, arguing that *Williams* did not apply because his was only a two-strike case; the indeterminate term did not come from application of the Three Strikes law but was the punishment provided by section 206.1 for torture. (*Misa, supra*, at p. 846.)

Misa concluded that, although the case was not a third strike case, the *Williams* reasoning applied. (*Misa, supra*, 140 Cal.App.4th at p. 846.) As in *Williams*, the indeterminate term was not calculated under section 1170.1 so that *Tassell's* analysis was inapplicable to it. It did not matter that the indeterminate term did not result from application of the Three Strikes law. Section 667, subdivision (e), upon which *Williams* also relied, provides for enhanced punishment for defendants with one or two prior strikes. In either case, the term as enhanced under the Three Strikes law shall be “*in addition to any other enhancement or punishment provisions which may apply.*” (§ 667, subd. (e), italics added.) Similarly, the voter intent in passing section 667(a)--increasing sentences for repeat offenders--is the same whether the defendant has one or two prior strikes. Likewise, the Supreme Court's reference to the logic of the Three Strikes scheme--that increased punishment for a prior conviction be applied for *each* new offense--is applicable whenever the Three Strikes scheme comes into play. (*Misa, supra*,

at pp. 845-847.) *Misa* concluded, “Although *Misa* was a second strike defendant rather than a third striker, he is nonetheless a recidivist and, pursuant to the foregoing analysis of the applicable statutory scheme, is thus subject to a prior conviction enhancement under section 667, subdivision (a) on the torture count even though he also received a similar enhancement relating to the assault count.” (*Id.* at p. 847.)

Misa did not need to reach the broader question posed by the Attorney General in that case, which was whether a section 667(a) enhancement may be applied more than once to any indeterminate term, even when the Three Strikes law did not apply at all. (*Misa, supra*, 140 Cal.App.4th at p. 845.) We need not reach that far either. We conclude, as *Misa* did, that where a defendant is sentenced to multiple indeterminate terms, whether the indeterminate terms are the result of the Three Strikes law or are the punishment called for by another statute, if the defendant’s sentence is subject to the Three Strikes law, the section 667(a) enhancement is properly applied to each indeterminate term.

Defendant argues that no case authorizes the “multiple stacking” that occurred here. We disagree. The reasoning in *Williams* applies without regard to the number of convictions that are potentially subject to the section 667(a) enhancement. *Williams* contains no explicit or implicit limit upon the number of times the enhancement may be applied. Indeed, *Williams* concluded that the Three Strikes scheme uses the “fact of recidivism to separately increase the sentence imposed for *each new offense*.” (*Williams, supra*, 34 Cal.4th at p. 405, italics added.)

In the present case, the trial court calculated the determinate term according the rules of both the Three Strikes law and section 1170.1. The court doubled the determinate terms for eight of the 10 counts as required by section 667, subdivision (e)(1). The court then calculated the principal and subordinate terms as directed by section 1170.1 and added one five-year enhancement to the total. (*Tassell, supra*, 36 Cal.3d at p. 90.) The two indeterminate terms were calculated without reference to

section 1170.1. The base terms were the indeterminate terms called for by section 667.61, their minimum terms doubled for the one prior strike. That doubling was to be “in addition to any other enhancement” that may apply. (§ 667, subd. (e).) Accordingly, the trial court added one section 667(a) enhancement to each. There was no error.

III. DISPOSITION

The judgment is affirmed.

Premo, Acting P.J.

WE CONCUR:

Mihara, J.

Márquez, J.