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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ALFRED ALEXANDER HOLLIMON, Defendant and Appellant.	G050259 (Super. Ct. No. 13WF0274) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., Raquel M. Gonzalez and Anthony Da Silva, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Alfred Alexander Hollimon was convicted of child abuse and mayhem. Defendant's 11-month-old daughter, Y.V., was severely burned while defendant was bathing her. While treating Y.V. for her burns, doctors discovered she had suffered multiple recent fractures that were the result of nonaccidental trauma.

Following *People v. Anderson* (2011) 51 Cal.4th 989 and *People v. Jennings* (2010) 50 Cal.4th 616, we reject defendant's argument that the trial court had a sua sponte duty to instruct the jury regarding the defense of accident.

Alternatively, defendant argues that his trial counsel was deficient for failing to request an instruction on accident. We conclude defendant did not suffer any prejudice due to the lack of such an instruction. The accident instruction reiterates the need for the prosecution to prove defendant's intent in committing the crime, and evidence relating to the defense of accident, as testified to by defendant himself, was inconsistent with the injuries suffered by Y.V.

Finally, defendant argues that the trial court erred by enhancing his sentence due to a prior conviction in Nevada. Although the statutory elements of the crime of attempted robbery are different in Nevada from those in California, the information, guilty plea agreement, and judgment from defendant's prior conviction in Nevada establish that the crime he was convicted of committing there was the same as a conviction for attempted robbery in California.

We therefore affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

About 5:50 p.m. on January 26, 2013, police and paramedics responded to a 911 call from defendant's grandmother's house. Y.V. was found to have suffered third degree burns over 22 percent of her body.

At the scene, defendant told Westminster Police Officer Travis Hartman that he had given Y.V. a warm bath, and that he had repeatedly checked the water, which

did not seem hot. Defendant claimed Y.V. played in the bathtub for 10 to 20 minutes without crying, and splashed the water with her hands. After Y.V. had been in the bathtub for about 15 minutes, defendant noticed her legs were red, and thought the water might be too hot. Defendant said that when he pulled Y.V. out of the water, her legs were bleeding, and he began peeling off her skin. Defendant also told Officer Hartman that Y.V. had "banged her head" in the bathtub two nights earlier.

Defendant was questioned at the University of California, Irvine, hospital, where Y.V. was transported for treatment. During that interview, defendant again said he had checked the water temperature and it did not feel hot to him. Defendant said he left Y.V. unattended in the bathtub "for ten seconds, maybe," to get her a diaper while she played in the water. Defendant said she became "fussy crying," so he pulled her out of the bathtub and discovered "she was all red" and her skin was peeling off. Defendant peeled off the skin from her legs, then screamed for his mother; defendant claimed he thought removing Y.V.'s skin would not hurt her, but would help cool her down. Defendant denied burning Y.V. on purpose, and denied that Y.V. had been crying when she was in the water. Defendant again claimed Y.V. had bumped her head on the bathtub faucet two days earlier. Defendant was arrested following the interview at the hospital.

Dr. Nicole Bernal, who treated Y.V. in the hospital, and performed several surgeries to cut away burn tissue and replace it with skin grafts, testified that Y.V.'s injuries were consistent with having been dipped into hot water, and reflexively bending her legs up to protect herself. Y.V.'s injuries were not consistent with defendant's explanation of what had happened while he was bathing Y.V.

Dr. Sandra Murray, who also treated Y.V., testified that Y.V. had suffered very deep, third degree burns, and that the water temperature must have been at least 130 degrees. Y.V. had developed infections as a result of the burns, and was in the hospital in critical condition for two months. Y.V. underwent two surgeries on her feet "because the toes were contracted and pulled up so that they were not . . . flat on the

ground when she put her foot down." Y.V. would require additional skin grafts as she aged because "the graft skin does not grow as well as her normal skin does."

Dr. Murray testified that the pattern of burns on Y.V. was not consistent with defendant's story that she had been sitting in a tub of water for 15 to 20 minutes. Dr. Murray further testified that certain areas of Y.V.'s body were not burned because Y.V. reflexively bent her legs up toward her stomach when her feet or her buttocks touched the hot water. Dr. Murray opined that Y.V. was "absolutely clearly" dipped into the tub of hot water.

Dr. Murray also testified that X-rays taken at the hospital showed several recent fractures, including a right skull fracture, fractures of the vertebrae, a right rib fracture, and a right wrist fracture. Y.V. had been X-rayed 15 days before the burning incident; the foregoing injuries had all been suffered since that date. When she reexamined the earlier X-rays, Dr. Murray observed two healing right rib fractures; those had been acute on January 9, 2013, but were missed when the X-rays were originally reviewed. Dr. Murray testified that all of the fractures suffered by Y.V. were caused by "nonaccidental trauma." The fractures were not consistent with any of defendant's explanations, but rather had to have been caused by "high energy forces," such as those caused during an automobile accident or a multistory fall, and could not have been caused by Y.V. herself.

Y.V.'s maternal great-aunt, Jane V., testified that in January 2013, she was Y.V.'s foster mother. Visitation between Y.V. and defendant occurred at defendant's grandparents' house, and Y.V. was transported by a social worker. After Y.V. was returned from a visit with defendant on January 9, 2013, Jane V. noticed bruises on Y.V.'s ribs and pelvic bone area, and red marks on her shoulder and back. Jane V. called the social worker, the social worker's supervisor, and the child abuse hotline. She took Y.V. to St. Joseph Hospital, where Y.V. was examined. When Y.V. returned from a visit with defendant on January 16, Jane V. noticed a bruise on Y.V.'s forehead. Jane V. again

called the social worker, the supervisor, and the child abuse hotline. Jane V. refused to continue as Y.V.'s foster mother because she was worried that she would be blamed for Y.V.'s injuries. Defendant's grandmother became Y.V.'s foster parent, and Y.V. moved into her paternal great-grandmother's house on January 24—two days before she was seriously burned.

The parties stipulated that defendant inflicted corporal injury on the mother of his unborn child (Y.V.'s older sibling) on February 23, 2010.

Defendant testified in his own defense at trial. Defendant testified that he put Y.V. in the bathtub, where she played without crying and without any apparent problems for 15 to 20 minutes. Defendant left her alone two or three times, for a few seconds each time. The last time he returned to the bathroom, Y.V. was standing up in the bathtub, and was "not crying but like something was wrong." Defendant picked her up, and saw that her skin was peeling off. Defendant claimed he did not intentionally burn or harm Y.V., and that her injuries were the result of an accident, but admitted he accepted responsibility for Y.V.'s burns.

A jury convicted defendant of two counts of child abuse; one count related to Y.V.'s burns (count 1), while the other count related to her fractures and additional injuries (count 3). (Pen. Code, § 273a, subd. (a).) The jury also convicted defendant of one count of mayhem (count 2). (*Id.*, § 203.) With respect to count 1, the jury found true an allegation that defendant personally inflicted great bodily injury on a child under the age of five. (*Id.*, § 12022.7, subd. (d).)

In a bifurcated proceeding, defendant admitted he had a prior conviction, which the prosecution alleged was a serious and violent felony (Pen. Code, §§ 667, subds. (d) & (e)(1), 1170.12, subds. (b) & (c)(1)), and he had suffered a prior prison term for that offense (*id.*, § 667.5, subd. (b)). Over defendant's objection, the trial court found the prior conviction was a serious and violent felony.

The trial court sentenced defendant to a total prison term of 25 years eight months: the upper term of six years on count 1, doubled to 12 years; a consecutive upper term of six years for the great bodily injury sentencing enhancement; a consecutive term of five years for the serious felony prior conviction; and a consecutive one-third doubled midterm of two years eight months on count 3. (The court stayed execution of defendant's sentence on count 2, pursuant to Penal Code section 654.)

Defendant filed a timely notice of appeal.

DISCUSSION

I.

THE TRIAL COURT DID NOT HAVE A SUA SPONTE DUTY TO INSTRUCT THE JURY ON THE DEFENSE OF ACCIDENT.

Defendant argues that the trial court erred by failing to instruct the jury sua sponte on the defense of accident. (Pen. Code, § 26.) In *People v. Anderson*, *supra*, 51 Cal.4th at page 992, the California Supreme Court held "a trial court has no obligation to provide a sua sponte instruction on accident where, as here, the defendant's theory of accident is an attempt to negate the intent element of the charged crime." (See *People v. Jennings*, *supra*, 50 Cal.4th at pp. 674-675 [same].) We conclude the trial court did not err in this case.[1]

II.

DEFENDANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

Defendant contends that his trial counsel was ineffective in failing to request that the jury be instructed with CALCRIM No. 3404 on the defense of accident.[2]

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[1] Defendant acknowledges that under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, this court is required to follow *People v. Anderson*, but submits the argument to preserve it for federal court review.

[2] In his opening brief on appeal, defendant purports to raise a second issue—that his trial counsel was ineffective by conceding defendant's guilt as to count 1. Defendant fails to provide any argument supporting this contention; an argument

To prevail on a claim of ineffective assistance of counsel, defendant must prove by a preponderance of the evidence that his trial counsel's representation failed to meet an objective standard of reasonableness, and that absent counsel's deficient performance, there is a reasonable probability the result would have been more favorable to defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Frye* (1998) 18 Cal.4th 894, 979.)

We turn directly to the second prong and conclude there was no prejudice. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697; accord, *In re Fields* (1990) 51 Cal.3d 1063, 1079.)

In this case, the jury was properly instructed with CALCRIM Nos. 821 and 801, which contain the elements of child abuse likely to produce great bodily harm or death, and mayhem, respectively. Both instructions informed the jury what mental state the prosecution was required to prove as an element of the crime. CALCRIM No. 3404, which defendant contends should have been given to the jury as well, provides: "<*General or Specific Intent Crimes*> [¶] [The defendant is not guilty of _____ <*insert crime[s]*> if (he/she) acted [or failed to act] without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of _____ <*insert crime[s]*> unless you are convinced beyond a reasonable doubt that (he/she) acted with the required intent.] [¶] <*Criminal Negligence Crimes*> [¶] [The defendant is not guilty

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mentioned only in a heading has effectively been forfeited. (Cal. Rules of Court, rule 8.204(a)(1)(B) & (C).)

of _____ <*insert crime[s]*> if (he/she) acted [or failed to act] accidentally without criminal negligence. You may not find the defendant guilty of _____ <*insert crime[s]*> unless you are convinced beyond a reasonable doubt that (he/she) acted with criminal negligence. *Criminal negligence* is defined in another instruction.]" CALCRIM No. 3404 reiterates that intent is an element of the crime, which must be proven by the prosecution; giving that instruction would not have altered the result of the case.

In any event, the defense of accident was inconsistent with defendant's version of the case. Had defendant, without the intent to burn Y.V., dipped her into a scalding bath, he might not have had the necessary intent to be convicted of child abuse or mayhem. Defendant's contention that Y.V. was burned after sitting in a warm bath for an extended period of time, or that she was burned while defendant stepped out of the bathroom momentarily, was completely inconsistent with the testimony of two expert witnesses who explained how hot the water had to be, and how Y.V. must have been dipped into the water to produce the burns on her body.

The jury necessarily found defendant acted with the intent required to support convictions for child abuse and mayhem; there is no reasonable probability that the result would have been different if the jury had been instructed with CALCRIM No. 3404.

III.

NEVADA STRIKE

Defendant argues that the trial court erred in finding his 2008 Nevada conviction for attempted robbery was a prior strike and a serious felony, and, therefore, his sentence must be modified. "On review, we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. 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." (*People v. Miles* (2008) 43 Cal.4th 1074, 1083.)

Defendant waived his right to a jury trial on the prior conviction, and admitted he had been convicted on August 11, 2008, in the State of Nevada, for attempted robbery. Defendant contended in the trial court, and argues here, that attempted robbery in Nevada is not equivalent to attempted robbery in California, and therefore does not constitute a strike for sentencing purposes.

The trial court considered the information, guilty plea agreement, and judgment of conviction from the District Court of Clark County, Nevada, in case No. C245095. The information reads, in relevant part: "Alfred Hollimon . . . , having committed the crime of Attempt Robbery (Category B Felony—NRS 193.330, 200.380), on or about the 14th day of May, 2008, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada, did then and there wilfully, unlawfully, and feloniously attempt to take personal property, to-wit: an iPod, from the person of Henston Hortillosa, or in his presence, by means of force or violence, or fear of injury to, and without the consent and against the will of the said Henston Hortillosa." (Boldface & some capitalization omitted.) The guilty plea agreement provided that defendant pleaded guilty "to: Attempt Robbery (Category B Felony—NRS 193.330, 200.380), as more fully alleged in the charging document attached hereto as Exhibit '1'." (Boldface & some capitalization omitted.) (The attached charging document was the information quoted *ante*.) The judgment of conviction reiterated that defendant had entered a plea of guilty to attempted robbery.

In *People v. McGee* (2006) 38 Cal.4th 682, 688-689, the California Supreme Court concluded that, looking only at the statutory elements of the crime of robbery in California versus Nevada, the Nevada crime in that case would not count as a

strike or prior serious felony conviction.[3] The court then explained that "the relevant inquiry in deciding whether a particular prior conviction qualifies as a serious felony for California sentencing purposes is limited to an examination of the record of the prior criminal proceeding to determine the nature or basis of the crime of which the defendant was convicted." (*People v. McGee*, *supra*, at p. 691.) The determination was a legal one to be made by the court, not a jury. (*Id.* at p. 702.)

In *People v. McGee*, *supra*, 38 Cal.4th at page 688, the court held that the crime of robbery in Nevada differed from the crime of robbery in California because "under Nevada law, a taking accomplished by fear of *future* injury to the person or property of *anyone in the company of the victim at the time of the offense* qualifies as robbery [citation], whereas under California law such a taking does not [citation]." In the present case, the Nevada information makes clear that defendant attempted to commit the robbery by means of fear of injury to the victim, not someone in the company of the victim.

In *People v. McGee*, *supra*, 38 Cal.4th at page 688, the court also noted that the elements of the crime of robbery differ between California and Nevada because in Nevada, robbery is a general intent crime, while California requires proof of a specific

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[3] Nevada's statute prohibiting robbery provides, in relevant part: "Robbery is the unlawful taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence or fear of injury, immediate or future, to his or her person or property, or the person or property of a member of his or her family, or of anyone in his or her company at the time of the robbery. A taking is by means of force or fear if force or fear is used to: [¶] (a) Obtain or retain possession of the property; [¶] (b) Prevent or overcome resistance to the taking; or [¶] (c) Facilitate escape. [¶] The degree of force used is immaterial if it is used to compel acquiescence to the taking of or escaping with the property. A taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear." (Nev. Rev. Stat. § 200.380(1).)

intent to permanently deprive the victim of property. Neither the information nor any of the other documents from defendant's Nevada case specifies that defendant acted with the specific intent to permanently deprive the victim of his property. *People v. McGee* teaches that no special language is required to establish that the prior robbery conviction was committed with that specific intent, however.

In *People v. McGee*, *supra*, 38 Cal.4th at page 689 and footnote 3, the court held the following information was sufficient to establish the Nevada robbery convictions were serious felonies for sentencing enhancement purposes: "With regard to the 1988 Nevada case, the prosecution introduced various documents, including the transcript of the preliminary hearing in that proceeding. This transcript included the testimony of the victim, Delmar D. Foust, reflecting that while waiting with his brother and two friends at a Reno bus station near midnight, he encountered defendant, who 'threatened us and he [defendant] took my money.' Asked what other actions defendant took, Foust testified he observed defendant 'slapping another guy and saying that's what will happen if anybody tells on him.' Defendant demanded money from Foust, who gave him $2. Asked why he gave defendant the money, Foust testified: 'Because I was afraid of being beat up.' At the hearing at which he entered his plea of guilty, defendant admitted having committed the robbery.[4] [¶] With regard to the 1994 Nevada case, the prosecution introduced

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[4] "The transcript of these proceedings includes the following colloquy (italics added):

'The court: "The elements of the offense are as follows: [t]hat you did on or about January 15, 1988, within Washoe County, Nevada, willfully and unlawfully take personal property, that being money, from the person of Delmar Foust, at the City Fare Bus transfer area in Washoe County, Nevada; that you did this against his will, and by means of fear or immediate or future injury to his person. Do you understand that that is the charge against you?"

'Defendant: "Yes."

'The court: "Is that in fact what you did?"

'Defendant: "Yes."

'The court: "Did you force Mr. Foust to give you money?"

various documents, including the transcript of the preliminary hearing in that proceeding. This transcript included the testimony of the victim, Ian T. Baker, who described defendant asking him for money. Baker offered defendant some change. Defendant, who was accompanied by another individual, replied, 'No, we want money.' Baker refused to further comply. Defendant then struck him, causing him to fall. Baker then gave defendant his wallet, and defendant took $120 from it, as well as Baker's portable tape player. The transcript of the proceedings reflects that defendant was asked in open court whether he took personal property from Baker against Baker's will, and that defendant admitted having done so; in a written plea form, defendant acknowledged 'willfully and unlawfully [having taken] personal property . . . from the person of Ian T. Baker . . . against his will and by means of force or violence.'"[5]

Thus, the Supreme Court concluded that despite the difference in the statutory language, the facts it could properly consider regarding intent established that the defendant in *People v. McGee* had committed a crime in Nevada, which was the same as the crime would be in California for sentencing enhancement purposes. In the present case, by admitting in his guilty plea that he had committed attempted robbery as set forth fully in the information, defendant admitted sufficient facts to establish that his attempted robbery conviction in Nevada was comparable to a conviction for attempted robbery in

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'Defendant: "Yes."

'The court: "Did you do that by means of fear of immediate or future injury to him? *Did you make him afraid of what would happen if he did not give you money*?"

'Defendant: "Yes."'"

[5] The Nevada and California statutes regarding attempt are virtually identical; defendant does not argue to the contrary. "An act done with the intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime." (Nev. Rev. Stat. § 193.330(1).) "An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (Pen. Code, § 21a.)

California, with respect to the intent element. Therefore, the trial court did not err in enhancing defendant's sentence.

Defendant argues that *People v. McGee* is no longer good law, citing *Descamps v. United States* (2013) 570 U.S. ___ [133 S.Ct. 2276] (*Descamps*). In *Descamps*, the United States Supreme Court held that, in determining whether the defendant had a prior conviction for purposes of increasing his sentence under the Armed Career Criminal Act of 1984 (18 U.S.C. § 924(e)), a sentencing court generally could not look beyond the elements of the statute the defendant was convicted of violating. The court identified three grounds for its "elements-centric, 'formal categorical approach.'" (*Descamps*, *supra*, at p. ___ [133 S.Ct. at p. 2287].) First, the approach comported with the text and history of the Armed Career Criminal Act—a consideration that is not relevant here. (*Ibid.*) Second, the approach was consistent with the court's previous holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), that "'[o]ther 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.'" (*Descamps*, *supra*, at p. ___ [133 S.Ct. at p. 2288].) Finally, the approach would obviate the need to "expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense. The meaning of those documents will often be uncertain. And the statements of fact in them may be downright wrong." (*Id.* at p. ___ [133 S.Ct. at p. 2289.) In the present case, there is no similar concern—defendant's guilty plea accepts verbatim the language of the information.

The United States Supreme Court also held that when the prior conviction is for violating a divisible statute (where the elements of the crime provide for alternative ways in which it may be violated), the sentencing court may consider "a limited class of

documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction." (*Descamps*, *supra*, 570 U.S. at

p. ___ [133 S.Ct. at p. 2281].) In this case, in determining whether defendant had committed the attempted robbery by using force or fear against the victim, as opposed to the threat of force or fear against someone in the victim's presence, the trial court could properly consider the information, guilty plea agreement, and judgment of conviction from the Nevada court case.

The remaining issue in this case is whether the trial court could consider the information, guilty plea agreement, and judgment of conviction in the Nevada case to determine whether defendant had the necessary intent in committing attempted robbery in Nevada to be equivalent to a violation of the California robbery statute. Three recent cases from the California Courts of Appeal, which follow and interpret *Descamps*, inform our decision.

In *People v. Wilson* (2013) 219 Cal.App.4th 500, 503-504, the defendant was convicted of felony drunk driving, and his sentence was enhanced under the "Three Strikes" law. The defendant had pleaded no contest, in a prior case, to gross vehicular manslaughter while intoxicated. (*Id.* at p. 503.) The trial court considered the preliminary hearing transcript from the previous case to determine the defendant had personally inflicted great bodily injury on the victims (*id.* at p. 503); the defendant did not admit the disputed facts of inflicting great bodily injury (*id.* at p. 506). The appellate court reversed the increase in sentence under *Descamps* because the trial court had improperly made findings related to disputed facts to determine whether the prior conviction was a strike. (*People v. Wilson*, *supra*, at pp. 515-516.)

The court in *People v Wilson*, *supra*, 219 Cal.App.4th at pages 515-516, explained: "Turning to the case at bar, we hold that the Sixth Amendment under *Apprendi* precluded the court from finding the facts—here in dispute—required to prove a strike prior based on the gross vehicular manslaughter offense. Like the court that sentenced Descamps, the trial court looked beyond the facts necessarily implied by the

elements of the prior conviction. The record here was even barer than that in *Descamps*. There is no record of any plea colloquy, or any other admissions—factual or otherwise—made by Wilson on the record of the prior conviction. The only facts in the record—apart from those necessarily implied by the elements of the offense—are those found in the transcript of the preliminary hearing. The hearing consisted of testimony from several witnesses who offered statements evidencing, at times, competing versions of key facts. None of Wilson's statements—not even those offered via hearsay by the officer who questioned him—established personal infliction. To the contrary, the record shows Wilson explicitly contested the key fact at issue—whether Horvat grabbed the steering wheel. To resolve the issue, the sentencing court was necessarily required to weigh the credibility of various witnesses and statements. The trial court could not have increased Wilson's sentence without '"mak[ing] a disputed" determination' of fact—a task the United States Supreme Court specifically counseled against. [Citation.] [¶] We need not consider here whether the broader application of *Apprendi* and *Descamps* to California's sentence enhancement scheme would leave intact the kinds of findings—e.g., those not concerning the facts of a defendant's prior conduct—heretofore endorsed under California law. We hold only that federal law prohibits what [*People v.*]*McGee*[, *supra*, 38 Cal.4th 682] already proscribed: A court may not impose a sentence above the statutory maximum based on disputed facts about prior conduct not admitted by the defendant or implied by the elements of the offense."

The court in *People v. Wilson* also noted that an unauthorized sentence under *Apprendi* and *Descamps* was subject to review for harmless error under the *Chapman v. California* (1967) 368 U.S. 18 standard—whether it could be concluded beyond a reasonable doubt "that a jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true the strike prior allegation." (*People v. Wilson*, *supra*, 219 Cal.App.4th at p. 519.) The appellate court concluded the error in that case

was not harmless beyond a reasonable doubt because "[t]he record contained several facts from which a jury could rationally find reasonable doubt as to the finding of personal infliction [of great bodily injury]." (*Ibid.*)

In *People v. Saez* (2015) 237 Cal.App.4th 1177, 1182-1183, 1191, the trial court enhanced the defendant's sentence based on a prior conviction in Wisconsin for false imprisonment while armed.[6] The appellate court first held that, while the crime of which the defendant was convicted in Wisconsin was not necessarily a strike under California law (*id.* at pp. 1193-1194), under *People v. McGee*, the trial court could properly rely on the record of conviction in the Wisconsin case to establish that the Wisconsin conviction qualified as a prior strike (*People v. Saez*, *supra*, at pp. 1195-1198). The court then held that, under *Descamps*, the trial court violated the defendant's Sixth Amendment rights by relying on the Wisconsin record of conviction. (*People v. Saez*, *supra*, at pp. 1198-1208.) Notably, the appellate court emphasized "that the trial court acted in contravention of the Sixth Amendment by necessarily relying on the police officer's statements in the Wisconsin record of conviction to increase Saez's sentence." (*Id.* at p. 1208.) The court did not go further to hold that reliance on the language of the criminal complaint or information, to which a defendant pleaded guilty, would violate *Descamps*.

Most recently, in *People v. Marin* (2015) 240 Cal.App.4th 1344, 1348, the trial court enhanced the defendant's sentence based on a jury finding that a prior conviction for vehicular manslaughter qualified as a strike under the Three Strikes law. The appellate court concluded that the evidence was insufficient to prove the defendant's

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[6] The trial court also increased the defendant's sentence based on a prior conviction for armed robbery; the defendant did not challenge the trial court's use of that conviction on *Apprendi* grounds. (*People v. Saez*, *supra*, 237 Cal.App.4th at p. 1191, fn. 12.)

prior vehicular manslaughter conviction qualified as a strike. (*Ibid.*) "We hold (1) under *Descamps*, judicial factfinding authorized by *People v. McGee* (2006) 38 Cal.4th 682 . . . , going beyond the elements of the crime to 'ascertain whether that record reveals whether the conviction realistically may have been based on conduct that would not constitute a serious felony under California law' [citation], violates the Sixth Amendment right to a jury trial; (2) that right is not violated when, in determining whether a prior conviction qualifies to increase a defendant's punishment, the trial court considers 'the documents . . . approved in [*Taylor v. United States* (1990) 495 U.S. 575 . . . and *Shepard v. United States* (2005) 544 U.S. 13 . . .]—i.e., indictment, jury instructions, plea colloquy, and plea agreement' [citation]—to determine the statutory elements of the crime of which the defendant was convicted [citation]; (3) under the reasoning of *Descamps*, the Sixth Amendment does not bar judicial factfinding beyond the statutory elements of the prior conviction, if in entering a guilty plea to the prior offense, the defendant waived his right to a jury trial as to such facts and either admitted them or they were found true by the court with the defendant's assent . . . ." (*Id.* at pp. 1348-1349.)

In the present case, defendant's sentence was increased based on a prior conviction for which the trial court considered the information, guilty plea agreement, and judgment of conviction from the previous case. This procedure does not run afoul of *Descamps*, as it has been interpreted by California appellate courts. There was no dispute as to the intent element of defendant's Nevada prior conviction, based on his guilty plea. And, even if the trial court erred, the error was harmless beyond a reasonable doubt because, given the clear language of the information, guilty plea agreement, and judgment of conviction, a jury would have found beyond a reasonable doubt the prior conviction to be a strike felony.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.