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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ARTHUR LEE LUCAS II, Defendant and Appellant.	G045634 (Super. Ct. No. 11NF0263) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue, Judge. Affirmed.

Jean Matulis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lilia E. Garcia and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Arthur Lee Lucas II twice ran his car into the car driven by his ex-girlfriend after they had engaged in a screaming match in the middle of a public street. Defendant was convicted of aggravated assault and sentenced to a total of 14 years in prison. Finding no merit to defendant's arguments on appeal, we affirm the judgment.

Defendant argues the trial court erred by imposing a five-year sentencing enhancement under Penal Code section 667, subdivision (a), because his previous serious felony conviction was reduced to a misdemeanor and dismissed. (All further statutory references are to the Penal Code.) Defendant contends that the prior offense was therefore not a felony conviction for which a sentencing enhancement could be imposed. We publish this opinion because, based on our analysis of the state Constitution and the relevant statutes, we hold a serious felony conviction must be treated as such when imposing a sentence enhancement for a later-committed crime, despite the reduction of the previous serious felony to a misdemeanor.

For the reasons we explain *post*, we also reject defendant's arguments relating to the trial court's pretrial review of the personnel records of the arresting officer and claimed instructional error. Finally, the trial court did not err by failing to dismiss one of defendant's prior serious felony convictions for purposes of sentencing under the "Three Strikes" Law (Pen. Code, §§ 667, subds. (b)-(e), 1170.12).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Defendant and Stacy McGowan dated on and off, starting in 1999. On several occasions between 2001 and their separation in early 2010, defendant assaulted McGowan, threatened her, yelled obscenities at her, or stalked her.

On January 19, 2011, McGowan was walking down a street when defendant pulled up in his car and demanded, in an angry tone of voice, to talk to her. McGowan told defendant she could not talk at that time. Later that afternoon, McGowan

saw defendant in her rearview mirror as she pulled out of the driveway of her place of work. Defendant pulled his car behind and then alongside of McGowan's car, and signaled for McGowan to pull over. McGowan sped away, but defendant continued to follow her.

When McGowan stopped at a red light, defendant pulled up alongside of her car, and yelled angrily. When McGowan told defendant to leave her alone, he responded, "I'm going to kill you, bitch. I'm going to kill you." McGowan got out of her car, approached defendant's car, and demanded, "what the fuck you want with me? Why you keep bothering me? Leave me alone." Defendant continued to say, "I'm going to get you, bitch." He grabbed her by the hair and pulled her by the arm into his car; McGowan thought defendant was going to bite her. She swung her arms and grabbed defendant or hit him in the face. McGowan was able to free herself.

McGowan got back into her car and drove away. Defendant tried to use his car to block her, but she maneuvered her car around his. As she drove away, McGowan felt her car get hit from behind. Her car stalled in the middle of the street. Defendant's car then hit the side of McGowan's car. McGowan exited her car and saw defendant walking quickly toward her; he was "angry."

At that moment, the police arrived. Buena Park Police Officer Ron Catanzariti was one of the responding officers. Officer Catanzariti noted that defendant had a "moderate odor of alcoholic beverage on his breath and person," but, "after a quick evaluation, I realized that it wasn't to the point where it could impair [defendant's] driving ability." Defendant told Officer Catanzariti that McGowan had attacked him and had rammed her car into his car, causing him to lose control of the car; he insisted "that in no way, shape, or form did he do anything to harm her."

Two witnesses, who had been in a car behind defendant's car at the intersection, testified that when defendant's car pulled up next to McGowan's car, defendant was yelling, waving his arms, and making hand gestures toward McGowan.

McGowan approached defendant's car and asked, "you want to do this right now?" McGowan started throwing punches at defendant through the open driver's side window. Defendant initially tried to defend himself, but he began throwing punches at McGowan. McGowan started yelling, "call the police" or "call 911," and ran back to her car. As McGowan began driving away, defendant's car struck the rear of her car. As McGowan continued to drive away, defendant again used his car to hit McGowan's car.

Defendant was charged in an information with aggravated assault (§ 245, subd. (a)(1)) and making criminal threats (§ 422).[1] The information also alleged defendant had suffered two prior serious and violent felony convictions (§§ 667, subds. (d) & (e)(2)(A), 1170.12, subds. (b) & (c)(2)(A)), had been convicted of two prior serious felonies (§ 667, subd. (a)(1)), and had served two prior prison terms (§ 667.5, subd. (b)). A jury found defendant guilty of aggravated assault, and not guilty of making criminal threats.

In a bifurcated proceeding, the trial court found the two prior serious felony conviction allegations to be true beyond a reasonable doubt. The court struck one of the prior serious and violent felony convictions, but found the other to be true. The court denied defendant's motion to dismiss the remaining prior serious and violent felony conviction, pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The court also found one of the prison priors to be true, but the other to be not true. The court selected the low term of two years for aggravated assault and doubled it due to the prior serious and violent felony conviction (§ 667, subds. (d) & (e)(1)). The court also imposed two five-year enhancements for the prior serious felony convictions (§ 667, subd. (a)(1)), resulting in a total prison term of 14 years. Finally, the court struck defendant's remaining prison prior for purposes of sentencing (§ 667.5, subd. (b)).

[1] Defendant was also charged with domestic violence battery (§ 243, subd. (e)(1)) and violation of a protective order (§ 166, subd. (c)(1)). The trial court granted the prosecution's motions to dismiss those charges.

DISCUSSION

I.

DEFENDANT'S MOTION PURSUANT TO PITCHESS V. SUPERIOR COURT *(1974) 11 CAL.3D 531*

Before trial, defendant filed a motion for pretrial discovery, requesting, in part, that the court review the personnel records of Officer Catanzariti. The court conducted an in camera hearing, and determined there were no records relevant to defendant's claim that Officer Catanzariti's police report contained false statements.

Defendant and the Attorney General agree that this court should conduct an independent review of the sealed reporter's transcript of the in camera hearing to determine whether the trial court abused its discretion in denying defendant's motion for disclosure of information contained in Officer Catanzariti's personnel records. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1285.)

We have reviewed the sealed transcript of the in camera hearing. At the hearing, the trial court described, on the record, the items contained in Officer Catanzariti's personnel file produced by the custodian of records, reviewed those items, and questioned the custodian of records about them and any other documents that might exist. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229 [the trial court is not required to place photocopies of documents produced by the custodian of records in a confidential file, but may state for the record what documents it examined in camera].) The record shows the trial court confirmed Officer Catanzariti's personnel file from the Buena Park Police Department did not contain discoverable information and there were no other documents with the requested information. The court did not err in denying defendant's motion.

II.

INSTRUCTIONAL ERROR

Defendant argues the trial court prejudicially erred in instructing the jury as to how it could use evidence of defendant's voluntary intoxication. The court instructed

the jury with CALCRIM No. 875 regarding aggravated assault; in relevant part, the instruction read: "Voluntary intoxication is not a defense to assault." The court also instructed the jury with CALCRIM No. 3404, as follows: "The defendant is not guilty of aggravated assault if he acted without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of aggravated assault unless you are convinced beyond a reasonable doubt that he acted with the required intent."

Finally, the court instructed the jury with CALCRIM No. 3426, a limiting instruction regarding the use of the evidence of defendant's voluntary intoxication: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with the intent that a statement be taken as a threat in count [2]. [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] . . . [¶] In connection with the charge of criminal threats[,] the People have the burden of proving beyond a reasonable doubt that the defendant acted with the intent that the statement be taken as a threat. . . . [¶] . . . [¶] If the People have not met this burden, you must find the defendant not guilty of criminal threat[s]. [¶] As to the lesser included offense of attempt[ed] criminal threats there are two specific intents that need to be proved beyond a reasonable doubt: [¶] 1. The intent to threaten to commit a crime resulting in death or great bodily injury; [¶] and [¶] 2. The intent that the threat be taken as a threat. [¶] If the People have not met this burden, you must find the defendant not guilty of attempt[ed] criminal threat[s]."

Those instructions are all correct in law. (§ 29.4; *People v. Hood* (1969) 1 Cal.3d 444, 458-459 [the defendant's voluntary intoxication may not be considered in determining whether the defendant committed assault, which is a general intent crime].) Because defendant did not object to any of those jury instructions in the trial court, he has

forfeited the right to challenge them on appeal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1260.)

Even if we were to consider defendant's arguments on the merits, and even if we somehow concluded there was an instructional error, we would conclude the error was harmless under the standard of either *Chapman v. California* (1967) 386 U.S. 18, 24 (harmless beyond a reasonable doubt) or *People v. Watson* (1956) 46 Cal.2d 818, 836 (reasonably probable a more favorable result would have been obtained). Defendant argues, "[t]here was abundant evidence that [defendant] had been drinking that day, and had lost control of his car and hit [McGowan]'s bumper accidentally." At the time of the incident, defendant had a "moderate" odor of alcohol on his breath, but Officer Catanzariti, who was trained and experienced in recognizing whether a driver is under the influence of alcohol, determined defendant's driving ability was not impaired. Defendant had repeatedly threatened McGowan, on the day of the incident and earlier. The two witnesses who observed both collisions testified defendant twice ran his car into McGowan's car. Defendant never told Officer Catanzariti that the collision had been an accident, caused when he lost control of his car; to the contrary, he claimed McGowan hit his car, which caused him to lose control of his car. Not only is there not "abundant" evidence that the collision was an accident, but there is no evidence supporting that theory.

III.

PRIOR CONVICTION

Defendant argues the trial court erred by imposing a five-year sentencing enhancement under section 667, subdivision (a)(1)[2] for a prior serious felony conviction

[2] "In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges

for assault with a deadly weapon, a firearm; the date of that conviction was January 15, 1988 (the prior offense). On December 31, 1991, the Los Angles County Superior Court reduced the conviction on the prior offense to a misdemeanor, pursuant to section 17,[3] and dismissed it, pursuant to section 1203.4.[4] Defendant therefore argues that the trial court erred by imposing the five-year sentencing enhancement under section 667, subdivision (a)(1), because, in his view, the prior offense was not a felony.[5]

Defendant argues that because the prior offense was reduced to a misdemeanor "for all purposes" (§ 17, subd. (b)(3)), the trial court could not impose a sentencing enhancement based on it. It is true that "[r]elief under Penal Code section 17

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brought and tried separately. The terms of the present offense and each enhancement shall run consecutively." (§ 667, subd. (a)(1).)

[3] "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, *it is a misdemeanor for all purposes* under the following circumstances: [¶] . . . [¶] (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor." (§ 17, subd. (b), italics added.)

[4] "In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted . . . . However, *in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed*." (§ 1203.4, subd. (a)(1), italics added.)

[5] This issue is currently pending before the California Supreme Court. (*People v. Park*, review granted Aug. 10, 2011, S193938.)

changes the fundamental character of the offense." (*Gebremicael v. California Com. on Teacher Credentialing* (2004) 118 Cal.App.4th 1477, 1489 (*Gebremicael*).) However, the court in *Gebremicael* did not address, much less resolve, the question before us, or indeed any sentencing issue. That case addressed only whether the reduction of a felony to a misdemeanor, pursuant to section 17, affected the defendant's eligibility to apply for a teaching credential. (*Gebremicael*, *supra,* at p. 1480.)

Based on our analysis of the statutory scheme and our state Constitution, we reject defendant's argument. First, the language of section 667, subdivision (a)(1) applies to "any person convicted of a serious felony who previously has been convicted of a serious felony . . . ." Defendant was, undisputedly, previously convicted of a serious felony. The later reduction of the prior offense to a misdemeanor and its ultimate dismissal do not go back in time to erase the conviction. "If ultimately a misdemeanor sentence is imposed, the offense is a misdemeanor from that point on, but not retroactively . . . ." (*People v. Feyrer* (2010) 48 Cal.4th 426, 439.)

Similarly, the express language of section 1203.4, subdivision (a)(1) makes clear that the five-year sentencing enhancement under section 667, subdivision (a)(1) was proper, despite the dismissal of the prior offense. Section 1203.4, subdivision (a)(1) provides that "in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed." This language shows the legislative intent to allow the use of a previous serious felony conviction, such as the prior offense in this case, for all purposes in subsequent criminal actions, even if the information underlying the previous serious felony conviction has been dismissed due to the defendant's successful completion of his or her probation.

In 1982, Proposition 8 added (1) Penal Code section 667 and (2) section 28, former subdivision (f) to article I of the California Constitution, which read, in part, as follows: "*Any prior felony conviction* of any person in any criminal proceeding, whether

adult or juvenile, *shall subsequently be used without limitation for purposes of* impeachment or *enhancement of sentence* in any criminal proceeding." (Cal. Const., art. 1, § 28, former subd. (f), italics added.) Section 28, former subdivision (f) to article I of the California Constitution became section 28, subdivision (f)(4) due to further amendments to the California Constitution, enacted by Proposition 9 in 2008 (known as Marsy's Law). The language of section 28, subdivision (f)(4) is identical to that of section 28, former subdivision (f).

Proposition 8 was "aimed at achieving more severe punishment for, and more effective deterrence of, criminal acts . . . ." (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 247.) The prior offense, although it was later reduced to a misdemeanor and then dismissed, remains a prior felony conviction which, by the terms of the California Constitution, shall subsequently be used for purposes of sentencing enhancement. (See generally *People v. Banks* (1959) 53 Cal.2d 370, 390 ["even if the petitioner had obtained a dismissal of the prior charge, such prior conviction would be available to support a subsequent determination of habitual criminality because the habitual criminal statute . . . 'relates to a prior conviction of felony, and not to the manner in which the judgment on the conviction has been expiated'"].)

To the extent there is any conflict between the language of section 17, subdivision (b), on the one hand, and sections 667, subdivision (a)(1) and 1203.4, subdivision (a)(1), on the other, standard rules of statutory construction would resolve that conflict. All the rules of statutory construction also support treatment of the prior offense as a serious felony conviction for purposes of sentencing enhancement. Generally, in interpreting a statute, we presume that the enacting body was aware of existing related laws and intended to maintain a consistent body of rules. (*Pulli v. Pony Internat., LLC* (2012) 206 Cal.App.4th 1507, 1517.) In this case, we presume the voters of the State of California were aware of section 17, subdivision (b)'s language when they enacted section 667 and amended the California Constitution to provide that any prior

serious felony conviction may be used without limitation for purposes of enhancing a defendant's sentence in later criminal proceedings.

This result is also consistent with two other basic tenets of statutory construction. First, later-enacted statutes generally govern over previously enacted ones. (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 908 (dis. opn. of Lucas, C. J.).) Because section 667, former subdivision (a) was enacted by the electorate when section 17, subdivision (b) was in place in its current iteration (see Stats. 1969, ch. 1144, § 1), section 667 must prevail in this case.

Second, "specific statutes prevail over general statutes." (*People v. Ahmed* (2011) 53 Cal.4th 156, 159.) Section 17 is a general statute, providing that a wobbler is a misdemeanor for all purposes when certain conditions are met. Both sections 1203.4, subdivision (a)(1), and 667, subdivision (a)(1) specifically limit that general language, and, therefore, are the more specific statutes.

In addition to the express provisions of the California Constitution and sections 667, subdivision (a)(1) and 1203.4, subdivision (a)(1), the public policy underlying the statutes at issue, including section 17, subdivision (b)(3), supports our conclusion. Section 17 is "grounded in rehabilitative principles." (*People v. Lassiter* (1988) 202 Cal.App.3d 352, 356.) Similarly, "[t]he clear intent of the probation sections of the Penal Code and especially of section 1203.4 is to effect the complete rehabilitation of those convicted of crime." (*People v. Taylor* (1960) 178 Cal.App.2d 472, 478.)[6] The purpose of section 667 "is to deter habitual criminal activity and to provide retributive punishment of persons who repeatedly break the law by significantly enhancing their

[6] Section 1203.4 is not intended to eliminate all traces of a defendant's felony conviction. Subdivisions (a)(2) and (a)(3) of section 1203.4 provide that the dismissal of an information under that statute does not permit someone previously convicted of a felony to possess a firearm, or shield him or her from conviction of being a felon in possession of a firearm, and does not permit him or her to hold public office, if such a prohibition would have applied without the dismissal.

sentences for subsequent convictions." (*People v. Lassiter*, *supra*, at p. 356.) Defendant was placed on probation for the prior offense in order to give him an opportunity to pursue rehabilitation. If and when the trial court determined his performance on probation demonstrated his rehabilitation, he had the opportunity to have the felony reduced to a misdemeanor under section 17, subdivision (b)(3), and then dismissed under section 1203.4, subdivision (a). (*People v. Feyrer*, *supra*, 48 Cal.4th at pp. 439-440.)

The policy that a prior serious felony conviction will continue to be treated as such for purposes of sentence enhancement, despite its subsequent reduction and dismissal, creates a strong incentive for a criminal defendant not to reoffend. "When the deterrent effect of the law fails and the defendant subsequently commits another felony, he or she becomes a repeat offender and deserves harsher punishment, regardless of whether judgment and sentence have been pronounced on the initial offense." (*People v. Williams* (1996) 49 Cal.App.4th 1632, 1638.)

IV.

THREE STRIKES LAW

Finally, defendant argues the trial court erred by doubling his two-year sentence under the Three Strikes law. The information alleged two prior serious felony convictions within the meaning of the Three Strikes law. The trial court struck one of defendant's prior serious felony convictions (the prior offense, discussed in detail, *ante*), but denied defendant's motion to strike the other one, pursuant to *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497.

Defendant contends that because the prior offense had been reduced to a misdemeanor, it was not really a felony conviction, and the trial court would probably have struck the other felony conviction if it had been aware of the misdemeanor status of the prior offense. However, it is not reasonably probable the trial court would have

imposed a more favorable sentence on defendant if it had been aware that the prior offense had been reduced to a misdemeanor.

The Three Strikes law explicitly provides that whether a prior felony conviction counts as a strike is determined "upon the date of that prior conviction and is not affected by the sentence imposed . . . ." (§ 667, subd. (d)(1).) "[B]y virtue of section 667, subdivision (d), the postsentence, postcommitment reduction of a felony conviction to a misdemeanor under section 17, subdivision (c), is of no consequence in the application of the three strikes law. [The defendant] pled to a felony in 1986, and this conviction therefore qualifies as a strike prior even though [the defendant] subsequently received a general discharge from the Youth Authority." (*People v. Franklin* (1997) 57 Cal.App.4th 68, 73; see also *People v. Sipe* (1995) 36 Cal.App.4th 468, 478 [whether a prior conviction is for a felony is determined on the date of the conviction, "so subsequent events, such as a reduction to a misdemeanor (§ 17, subd. (b)(3)), will not affect its classification as a felony conviction"].) Therefore, whether the prior offense was reduced to a misdemeanor could not affect its treatment as a prior serious felony conviction at sentencing for the current crime.

Additionally, the appellate record reflects that the trial court was aware of its discretion to dismiss the remaining prior serious felony conviction, and declined to do so after considering all the relevant factors. The court specifically noted that defendant had had convictions for violent crimes, previous incarcerations, and probation violations. Defendant's conduct in the present case was violent and dangerous, and could have resulted in serious injury. We find no abuse of discretion in the trial court's refusal to dismiss the prior serious felony conviction. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.)

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.