Filed 9/7/07

CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DON JEFFERSON, Defendant and Appellant.	C053130 (Super. Ct. Nos. 05F07297, 03F00265)

APPEAL from a judgment of the Superior Court of Sacramento County, Joseph A. Orr, J. Affirmed as modified.

Jennifer Mannix, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Judy Kaida, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts I and II.

In case No. 05F07297, a jury convicted defendant Don Jefferson of robbery (Pen. Code, § 211)[1] and of misdemeanor brandishing a deadly weapon. (§ 417, subd. (a)(1).) The jury found true the special allegation that the victim of the robbery was an elderly adult over the age of 65. (§ 667.9, subd. (b).) After a court trial, the trial court found defendant had suffered a prior conviction in Illinois for attempted murder, a serious felony under section 1192.7, subdivision (c). The trial court sentenced defendant to state prison for the middle term of three years for the robbery conviction, doubled to six years under the Three Strikes law, with an additional five years for an alleged section 667, subdivision (a) enhancement, for a total of 11 years. The trial court stayed the section 667.9, subdivision (b), enhancement. The trial court sentenced defendant to time served for his misdemeanor brandishing conviction.

In case No. 03F00265, defendant pled no contest to possession of cocaine base (Health & Saf. Code, § 11350, subd. (a)) and was placed on probation. A petition for violation of probation filed on August 19, 2005, alleged defendant violated the terms of his probation by, among other things, the conduct alleged in case No. 05F07297. Such allegations were found true, defendant's probation was revoked, and he was sentenced to

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[1] Undesignated statutory references are to the Penal Code.

prison for a two-year middle term to run concurrent to the sentence in case No. 05F07297.

Defendant filed a timely notice of appeal in both cases, but raises issues related only to case No. 05F07297. Defendant claims (1) the evidence of force is insufficient to support his conviction of robbery, (2) the evidence is insufficient to establish his Illinois conviction for attempted murder included all the elements required for a serious felony under section 1192.7, subdivisions (c)(8) and (c)(9), (3) the trial court's one "strike" finding should be vacated because his federal constitutional right to a jury determination was violated, and (4) the section 667.9, subdivision (b), enhancement should have been stricken instead of stayed. We agree with only the last contention. We shall order the section 667.9, subdivision (b), enhancement stricken and otherwise affirm the judgment.

FACTUAL BACKGROUND

On August 17, 2005, at around 1:30 p.m., 82-year-old Warren Nielsen was inside the U.S. Bank at 9th and J Streets in Sacramento. He had just left the teller and was heading outside. He was checking the $150 he had withdrawn from his bank account, getting ready to put it inside his wallet, when a man suddenly appeared alongside of him. The man took control of Nielsen's hand with one of his hands and grabbed Nielsen's money with the other hand. Nielsen testified that in the time he and the man "were fighting over the money," they went from inside the bank to outside the bank on J Street. Nielsen admitted "it wasn't much of a fight" because the man just grabbed the money,

pushed Nielsen away, and ran. Nielsen said he tried to hang onto his money, but could not do so. Nielsen said the man hurt him "a little bit" because he was grabbing for the money, but he did not think the man was trying to hurt him.[2] The man just wanted the money. Nielsen raised his hand with the money up near his face and as the man grabbed the money, the man exerted some pressure on the left side of Nielsen's jaw. Nielsen said it was "just a normal part of getting the money." When asked if the man had used any more force than necessary to get the money out of Nielsen's hand, Nielsen non-responsively answered that the man was not trying to hurt him; he just wanted the money. Nielsen believed the man used two hands; one to push his head away and the other to grab the money. Nielsen did not recall anything the man did or said before he took the money to make Nielsen afraid.

Nielsen testified he tried to run after the man, but the man disappeared into a park. Security officers from the bank started chasing the man. Nielsen went back inside the bank and the bank replaced his money.

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[2] Nielsen was asked whether he lost his footing at all. Nielsen responded: "No, he didn't hurt me." The prosecutor said, "Okay." Before the prosecutor asked any further question, Nielsen said, "Well, a little bit, because he was grabbing for the money; but he wasn't trying to hurt me, he just wanted the money." It appears Nielsen's use of the phrase "a little bit" qualified his immediately preceding statement that he was not hurt, rather than, as defendant asserts his answer to the prosecutor's earlier question regarding his loss of footing.

At the time of the incident, Steve Benstead was on his motorbike, riding on J Street, when a rapid movement to his left caught his attention. He turned and saw an encounter between a Caucasian man in his mid-70's or older and a young African-American man. One man ran into the other, causing a "deflection" of his body. He saw the two people rotate slightly. There were rapid hand movements consistent with something being taken. The older man used one hand, while the African-American man used both hands. The young African-American man took off running east on J Street. A large African-American man came out of a store and gave chase.

Benstead watched as the young man made a left onto 9th Street off of J Street and headed toward a park, where Benstead lost sight of him. Benstead turned left off of J Street onto 10th Street. When he saw a CHP bicycle officer, Benstead stopped and gave the officer a description of the incident he had witnessed and what the person involved looked like. Benstead then continued on 10th Street. After a couple of blocks, Benstead saw the large African-American man, who had been chasing the young man, running on a cross-street. Benstead turned right and when he caught up to the man, Benstead spotted the young man ahead of them. Benstead followed the young man into another park. When Benstead got close, the young man turned to face him and pulled out a knife. Benstead backed off, but continued to follow the young man at a distance. Then the CHP officer that Benstead had spoken to arrived. The officer drew his gun, ordered the young man (identified in court as

defendant) to the ground, and handcuffed him. Defendant had a wad of cash and a bank receipt clutched in his left hand. The account number on the receipt belonged to Nielsen. A knife was found a short distance away from defendant.

Terence Litton, the manager of Mango's Grill on J Street, also witnessed the incident between Nielsen and defendant. He was speaking to his employees when they brought to his attention something going on out on the sidewalk outside the restaurant; someone was being robbed. Litton turned and observed through the restaurant's window a slender Black man grabbing a bag from an elderly White man. The Black man was jerking the bag away while trying to push the elderly man off or away. Litton believed the man actually pushed the elderly man and he saw the elderly man start to go down. Litton did not know if he hit the ground because Litton instinctively ran after the Black man. Another man joined the chase. Finally, the man they were chasing was stopped by the police.

Both Litton and Benstead positively identified defendant to the police as the man they saw commit the crime. Litton told the police he witnessed a struggle and saw defendant take cash from the victim's hand.

DISCUSSION

I.

Sufficiency Of The Evidence Of Force

Defendant claims there is insufficient evidence of force to make his theft into a robbery. We disagree.

We determine the substantiality of the evidence from the whole record, view the evidence in the light most favorable to the prosecution, consider both reasonable inferences and circumstantial evidence, and affirm the judgment if there is evidence "'of ponderable legal significance . . . reasonable in nature, credible, and of solid value,'" from which a reasonable trier of fact could find defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576; see *People v. Holt* (1997) 15 Cal.4th 619, 667-669; see *People v. Ceja* (1993) 4 Cal.4th 1134, 1138.)

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) "It is the use of force or fear which distinguishes robbery from grand theft from the person." (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1707.) The force necessary for robbery is "at the very least . . . a quantum more than that which is needed merely to take the property from the person of the victim, and is a question of fact to be resolved by the jury taking into account the physical characteristics of the robber and the victim." (*People v. Wright* (1996) 52 Cal.App.4th 203, 210; see *People v. Mungia, supra,* at p. 1708; see *People v. Morales* (1975) 49 Cal.App.3d 134, 139.) However, "the degree of force utilized is immaterial." (*People v. Griffin* (2004) 33 Cal.4th 1015, 1025.) "'All the force that is required to make the offense a robbery is such force as is

actually sufficient to overcome the victim's resistance. . . .'" (*People v. Clayton* (1928) 89 Cal.App. 405, 411.)

In this case there is sufficient evidence to support the jury's determination that defendant used enough force to make his crime a robbery. Nielsen described defendant's actions to include taking control of Nielsen's hand, pushing Nielsen away, and exerting pressure on the left side of Nielsen's jaw. Nielsen believed defendant used two hands; one to push his head away and the other to grab the money. Nielsen said they fought over the money, going from inside to outside the bank and defendant hurt him "a little bit." The fact Nielsen viewed defendant's actions as just being part of getting the money and did not believe defendant was trying to hurt him or meant to hurt him did not prevent the jury from concluding, after taking into account the physical characteristics of defendant and Nielsen, that defendant used force beyond that which was necessary for merely taking the money.

The testimony of Litton and Benstead further supports the jury's conclusion. Litton saw defendant grab or jerk a bag (according to his trial testimony) or cash (according to his statement to the police) from Nielsen while trying to push Nielsen off or away. Litton saw Nielsen start to go down as a result of the push. Benstead saw defendant run into Nielsen, causing a "deflection" of his body. Defendant used both of his hands in his interaction with Nielsen.

It was up to the jury to weigh the evidence, evaluate any inconsistencies, and determine the credibility of the witnesses.

(*People v. Boyer* (2006) 38 Cal.4th 412, 480.) On appeal, we must view the evidence in the light most favorable to the judgment and determine whether there is substantial evidence from which a reasonable trier of fact could have found beyond a reasonable doubt the element of force necessary for robbery. (*People v. Staten* (2000) 24 Cal.4th 434, 460.) There is substantial evidence here.

II.

The Trial Court Properly Concluded Defendant's Illinois Prior Conviction For Attempted Murder Qualified As A Serious Felony

The trial court granted defendant's pretrial motion to bifurcate trial of his prior convictions and later granted the prosecution's motion to amend the information to allege only a single prior conviction for attempted murder. To expedite matters in the event of conviction, the court took up the legal issue of whether defendant's 1984 Illinois prior conviction for attempted murder qualified as a serious felony under California law while the jury was deliberating on the robbery and brandishing of a weapon charges. The prosecution contended the prior conviction qualified as a serious felony under section 1192.7, subdivisions (c)(8)[3] and (c)(9)[4]. In support of its

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[3] Section 1192.7, subdivision (c)(8) defines serious felony to include "any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm[.]"

[4] Section 1192.7, subdivision (c)(9) defines serious felony to include "attempted murder[.]"

position, the prosecution introduced into evidence a certified copy of the 1984 Illinois information charging defendant with attempted murder and copies of defendant's file from the Robinson Correctional Center in Illinois, which included, among other things, a copy of defendant's order of sentence and commitment based on defendant's "plea of guilty to charge of attempt murder" and a copy of a document entitled "OFFICIAL STATEMENT OF FACTS." After reviewing these records, the trial court found defendant had "pled to an offense in which he inflicted great bodily injury and it was a felony in which he personally used a firearm[,]" making his prior conviction a serious felony under section 1192.7, subdivision (c)(8).

Defendant contends the evidence is insufficient to establish his 1984 Illinois conviction for attempted murder included all the elements required for a serious felony under section 1192.7, subdivisions (c)(8) and (c)(9), making it a strike prior. Noting that neither the parties nor the trial court could find a copy of the Illinois statute defining attempted murder applicable in 1984, defendant claims the prosecutor failed to offer substantial evidence of all the elements of a 1984 Illinois attempted murder. Defendant claims the Illinois statutes that were introduced (1981 Ill. Revised Statutes, chapter 38, § 8-4 (attempt), § 9-1 (murder)) show Illinois permits a conviction of attempted murder based on a different mental state from that required in California. Defendant contends the prosecutor failed to prove the prior conviction qualified as a serious felony under subdivision

(c)(8) of section 1192.7 because the information did not establish defendant "personally inflict[ed]" great bodily injury on a person "other than an accomplice" or "personally used a firearm[.]" (§ 1192.7, subd. (c)(8).) He claims the Official Statement of Facts is not part of the record of conviction and is inadmissible hearsay.

We conclude substantial evidence supports the trial court's finding that defendant's 1984 attempted murder conviction qualified as a serious felony under subdivision (c)(8) of section 1192.7 because, even without the Official Statement of Facts, the documents introduced established defendant personally used a firearm in committing the prior offense. In light of this conclusion, we need not reach the issues relating to defendant's personal infliction of great bodily injury on a person other than an accomplice or the elements of attempted murder under 1984 Illinois law.

"To qualify as a serious felony, a conviction from another jurisdiction must involve conduct that would qualify as a serious felony in California." (*People v. Avery* (2002) 27 Cal.4th 49, 53; see §§ 667, subd. (d)(2), see 1170.12, subd. (b)(2).) The issue is "'the nature of the conviction[.]'" (*People v. McGee* (2006) 38 Cal.4th 682, 691 (*McGee*).) In making this determination, "the trier of fact may 'look beyond the judgment to the entire record of the conviction' [citation] '*but no further*' [citation]." (*People v. Trujillo* (2006) 40 Cal.4th 165, 177, original italics, citing *People v. Guerrero* (1988) 44 Cal.3d 343, 355, 356; see *People v. Myers* (1993) 5 Cal.4th 1193,

1195.) Such rule is reasonable because "it promotes the efficient administration of justice and, specifically, furthers the evident intent of the people in establishing [a conduct] enhancement[.]" (*Guerrero, supra,* at p. 355.) The rule is fair because "it effectively bars the prosecution from relitigating the circumstances of a crime committed years ago and thereby threatening the defendant with harm akin to double jeopardy and denial of speedy trial." (*Ibid.*)

In considering what documents are part of the record of conviction, the California Supreme Court has recognized the term "record of conviction" can be "used technically, as equivalent to the record on appeal [citation], or more narrowly, as referring only to those record documents reliably reflecting the facts of the offense for which the defendant was convicted." (*People v. Reed* (1996) 13 Cal.4th 217, 223.) "[T]he trier of fact may consider the entire record of the proceedings leading to imposition of judgment on the prior conviction." (*People v. Myers, supra,* 5 Cal.4th at p. 1195.)[5] Among other things, the charging information and court minute orders are part of the record of conviction. (*People v. Harrell* (1989) 207 Cal.App.3d 1439, 1445.)

Here, the 1984 Illinois information charged defendant, as the sole named defendant, with the offense of "attempt" "in that

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[5] The record of conviction is not limited to trial court records, but also includes, in general, appellate opinions. (*People v. Woodell* (1998) 17 Cal.4th 448, 455.)

he, without lawful justification with intent to commit the offense of murder, intentionally and knowingly attempted to kill Edward Beamon by shooting him in the body with a gun, in violation of Chapter 38, Section 8-4/(38-9-1) of the Illinois Revised Statutes 1981, as amended[.]" (Capitalization omitted.) According to the court order that sentenced defendant to prison, defendant entered a plea of guilty to this charge. From the language used in the information, it can be determined a firearm was used in the commission of the offense. Indeed, in an information charging *only* defendant with intentionally and knowingly attempting to kill the victim *by shooting him with a gun,* it is clear defendant personally used a firearm in the commission of the offense.

The trial court did not err in concluding defendant's Illinois prior conviction for attempted murder qualified as a serious felony under section 1192.7, subdivision (c)(8).

III.

The Trial Court's One "Strike" Finding Did Not Violate Defendant's Federal Constitutional Right To Jury Trial

Based on its finding that defendant's Illinois prior conviction for attempted murder qualified as a serious felony, the trial court doubled defendant's middle term sentence for robbery. (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1).) Defendant contends the trial court's one "strike" finding violated his federal constitutional right to a jury determination of whether his prior conduct constituted such a

strike.[6] Acknowledging his argument has been rejected by the California Supreme Court in *People v. Kelii* (1999) 21 Cal.4th 452 and *McGee, supra,* 38 Cal.4th 682, defendant argues these decisions were abrogated by the United States Supreme Court decisions in *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] and *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856] (*Cunningham*). We disagree.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) the United States Supreme Court held, recognizing its prior decision in *Almendarez-Torres v. United State*s (1998) 523 U.S. 224, 140 L. Ed. 2d 350, (*Almendarez-Torres*) that: "Other 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." (*Apprendi, supra*, 530 U.S. at p. 490 [147 L.Ed.2d at p. 455].)

In *McGee, supra,* 38 Cal.4th 682, the California Supreme Court considered whether *Apprendi* compelled the conclusion that a criminal defendant has a right under the federal Constitution to have a jury examine the record of a prior criminal proceeding to determine whether the nature of the earlier conviction subjects the defendant to an increased sentence under the applicable sentencing statutes. (*Id.* at pp. 685-686.) The

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[6] Defendant preserved this issue for appeal by asserting below that the determination of whether his Illinois conviction was a serious prior belonged to the jury, not the court.

Supreme Court reviewed a number of its prior decisions (*id.* at pp. 692-695, 699-700), reviewed *Apprendi* (*id.* at pp. 695-699), recognized numerous cases have interpreted the *Almendarez-Torres* exception for recidivism as not being "limited simply to the bare fact of a defendant's prior conviction, but extend[ing] as well to the nature of that conviction[]" (*id.* at p. 704, italics omitted), and observed that under California law, the inquiry involved in determining the nature of a prior conviction "is a limited one [that] must be based upon the record of the prior criminal proceeding[.]" (*Id.* at p. 706.) Based on the "significant difference between the nature of the inquiry and the fact finding involved in the type of sentence enhancements at issue in *Apprendi* and its progeny as compared to the nature of the inquiry involved in examining the record of a prior conviction to determine whether that conviction constitutes a qualifying prior conviction for purposes of a recidivist sentencing statute," the California Supreme Court concluded there was no federal constitutional right to a jury trial as to whether a prior conviction qualified as a serious felony under California law. (*Id.* at p. 709.) The court stated "the examination of court records pertaining to a defendant's prior conviction to determine the nature or basis of the conviction" was "a task to which *Apprendi* did not speak and 'the type of inquiry that judges traditionally perform as part of the sentencing function.'" (*Ibid.*)

In *Blakely*, the United States Supreme Court reiterated its holding in *Apprendi, supra,* 530 U.S. 466, 490 [147 L.Ed.2d 435,

455] 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.'" (*Blakely, supra*, 542 U.S. at p. 301 [159 L.Ed.2d at p. 412].) In *Cunningham, supra,* 549 U.S. ___ [166 L.Ed.2d 856], the United States Supreme Court repeated again: "Except for 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.'" (*Cunningham, supra,* at p. ___ [166 L.Ed.2d at p. 873].) Thus, the United States Supreme Court continues to recognize the *Almendarez-Torres* exception for recidivism. As the California Supreme Court's analysis in *McGee, supra,* 38 Cal.4th 682, rested largely on such exception, we believe it remains good authority even after *Blakely* and *Cunningham.*

IV.

The Section 667.9 Enhancement Should Be Stricken

The jury found true the enhancement allegation that the victim of the robbery was 65 years of age or older within the meaning of section 667.9, subdivision (b). At sentencing, the trial court stayed the imposition of the two-year section 667.9, subdivision (b), enhancement. Citing *People v. Luckett* (1996) 48 Cal.App.4th 1214, defendant claims the trial court erred in staying, rather than striking the enhancement. Respondent does not disagree that the trial court erred in staying the enhancement, but argues the matter should be remanded to the

trial court to exercise its discretion to either impose or strike the enhancement. We shall order the enhancement stricken.

Defendant filed a written motion with the trial court asking the court to strike his prior conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The trial court heard defendant's motion at the hearing for defendant's judgment and sentencing. Defendant argued the sentencing consequences of his 22-year-old prior conviction were unfair and requested the court to strike his prior *and* to either stay or dismiss the two-year enhancement under section 667.9. Defendant pointed out he did not harm Nielsen, did not brandish or use the knife he had in his possession, and was motivated largely by his need for drugs. The trial court denied defendant's request to strike his prior, but agreed to stay the section 667.9 enhancement. The trial court sentenced defendant on his robbery to state prison "for the midterm of 3 years, doubled, for a total of 6" and then imposed the "5-year enhancement under [section] 667(a), for an aggregate of 11 years in the state prison."

From the record, it is clear the trial court exercised its sentencing discretion and decided defendant should be sentenced to prison in accordance with the Three Strikes law for a total prison term of 11 years, but not more. In light of this, we shall not remand for resentencing, but shall order the section 667.9 enhancement stricken instead of stayed.

DISPOSITION

The judgment is modified to strike, rather than stay, the two-year enhancement pursuant to Penal Code section 667.9, subdivision (b), as to count one. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment, corrected as stated above, and to forward a certified copy to the Department of Corrections and Rehabilitation.

CANTIL-SAKAUYE, J.

We concur:

SIMS, Acting P.J.

RAYE, J.