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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD ALEX MILES,

Defendant and Appellant.

C045348

(Super. Ct. No.
SF087174A)

A jury found defendant Richard Alex Miles guilty of assault with a firearm upon a police officer (Pen. Code, § 245, subd. (d)(1); further section references are to the Penal Code unless otherwise specified), five counts of assault with a firearm (§ 245, subd. (a)(2)), four counts of attempted carjacking (§§ 215, subd. (a), 664), and one count of possession of a firearm by a convicted felon (§ 12021, subd. (a)). The jury also found true numerous enhancements for personal use of a firearm in connection with these offenses.

Finding defendant had two prior serious felony convictions (strikes) within the meaning of the "three strikes law" (§§ 667, subd. (d), 1170.12, subd. (b)), the trial court sentenced him to an aggregate term of 219 years to life in state prison.

On appeal, defendant contends the evidence was insufficient to support the finding that his prior conviction for federal armed bank robbery and kidnapping (18 U.S.C. § 2113(a), (d) & (e)) constituted a strike and, thus, he was denied due process of law. We disagree and shall affirm the judgment.

DISCUSSION

The information alleged that defendant had two prior strikes, one of which was a federal conviction in 1976 for armed bank robbery and kidnapping in violation of 18 U.S.C. section 2113(a), (d) and (e).

As proof of defendant's prior strike conviction in 1976, the People introduced a certified copy of the "pen package" received from the United States Medical Center for Federal Prisoners.

The package included a photograph of defendant, a fingerprint card, and the order of commitment. The fingerprint card with defendant's signature identifies the charge as "armed bank robbery & kidnap," with a "final disposition" of "40 yrs." The "Judgment and Probation/Commitment Order" from the United States District Court, Eastern District of California, states defendant pled guilty to a "violation of 18 U.S.C. 2113(a)(d)(e), armed bank robbery and[]kidnapping, as charged in the First Count of the Indictment" and was imprisoned "for a period of forty years" The

judgment and commitment order was signed by United States District Judge, Philip C. Wilkins.

Defendant's trial counsel argued this conviction is not necessarily a strike because 18 U.S.C. § 2113(a) can be violated by conduct that would constitute only second degree burglary under California law, which is not a serious or violent felony. As to the fact it was a conviction for an armed violation of the statute, counsel argued this does not establish defendant was personally armed as opposed to being convicted as an aider and abettor, under which circumstance the conduct would not qualify as a strike. As to the kidnapping component of the conviction, counsel argued the record fails to show that the movement was not merely incidental to the crime and, thus, insufficient to make it a strike.

The trial court found that the federal conviction qualified as a strike because the judgment's specification that it was for "armed bank robbery" was sufficient to bring defendant's conduct within section 1192.7, subdivisions (c)(19) and (d), and dispel any notion the conduct consisted only of a burglary of the bank.

For the reasons stated by his counsel at trial, defendant contends the evidence was insufficient to support a finding that his 1976 federal felony conviction constituted a strike under California law. We disagree.

The federal statute, 18 U.S.C. § 2113, under which defendant was convicted, is entitled, "Bank robbery and incidental crimes." It states in pertinent part:

"(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another,

or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

"Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny--

"Shall be fined under this title or imprisoned not more than twenty years, or both. [¶] . . . [¶]

"(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

"(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment."

A prior conviction constitutes a strike if it is for a serious felony as defined in section 1192.7, subdivision (c), or a violent felony as defined in section 667.5, subdivision (c). (§ 667, subd. (d)(1).) Bank robbery is listed as serious felony. (§ 1192.7, subd. (c)(19).)

The definition of bank robbery in first paragraph of 18 U.S.C. § 2113(a) (hereafter section 2113(a)) is virtually identical to the definition of bank robbery in section 1192.7, subdivision (d). Thus, a conviction of that offense would be a strike. However, the offense defined in the second paragraph of section 2113(a) corresponds not to robbery under California law, but to second degree burglary, which does not come within section 1192.7, subdivision (c). Hence, a conviction of that offense would not count as a strike. (*People v. Jones* (1999) 75 Cal.App.4th 616, 632.)

In determining whether a foreign conviction counts as a serious felony, the trial court considers the entire record of conviction. (*People v. Riel* (2000) 22 Cal.4th 1153, 1204-1205 [§ 667.5, subd. (f)]; *People v. Myers* (1993) 5 Cal.4th 1193, 1195 [§ 667, subd. (a)]; *People v. Jones, supra*, 75 Cal.App.4th at p. 632 [three strikes law].) The former rule that the trial court may consider only the "least adjudicated elements of the prior conviction" (*People v. Crowson* (1983) 33 Cal.3d 623, 634, italics omitted) is no longer the law in California. (*People v. Riel, supra*, 22 Cal.4th at p. 1205.) However, if the record fails to disclose any of the facts of the prior offense, the trial court must presume that the conviction was for the least

offense punishable under the foreign law. (*People v. Jones, supra*, 75 Cal.App.4th at p. 632 (hereafter *Jones*)).

Relying on *Jones*, defendant contends there is no proof in the record that he committed a bank robbery in 1976, a strike, rather than simply a burglary of a bank, which is a nonstrike offense under the second paragraph of section 2113(a).

In *Jones*, the appellant was convicted of multiple offenses, including robbery and kidnapping for robbery, and was found to have had a prior federal conviction for violating section 2113(a) that was alleged as a serious felony within the meaning of the three strikes law. (*Jones, supra*, 75 Cal.App.4th at p. 621.) As proof that the appellant had been convicted of this alleged serious felony, the People introduced a federal court document entitled "Judgment and Commitment," which indicated he had pled guilty to "the lesser included offense of violation of . . . [section] 2113(a)," along with a copy of section 2113(a). The People also introduced a card containing the appellant's fingerprints and signature, which card "indicate[d] the charge as 'Bank Robbery' and the final disposition of 10 years" (*Id.* at p. 631.)

Jones agreed with the appellant that the aforesaid evidence was insufficient to prove he had engaged in conduct that constitutes a serious felony under the three strikes law. The court explained: The judgment and commitment document was insufficient to establish that the federal conviction was for conduct constituting a strike under California law. This was so because it established only that the appellant had been convicted of "the lesser included offense"

of violating section 2113(a), a crime that could be established by two types of conduct, one of which (the burglary of a bank) does not constitute a strike. (*Jones, supra*, 75 Cal.App.4th at p. 634.) Because the document did "nothing to clarify whether the conduct to which [the appellant] admitted by way of pleading guilty fell under the first or second paragraph of section 2113(a)," it did not establish that the crime was the equivalent of a serious felony under California law. (*Ibid.*) The court recognized that the fingerprint card referred to the crime as "'Bank Robbery'"; but this did not "'reliably reflect[] the facts of the offense for which the [appellant] was convicted'" because it simply could have been a "reference to the statute as a whole." (*Ibid.*) Since the evidence presented by the People "did not suffice to disclose the facts of the prior offense actually committed, . . . the trial court should have presumed that the prior conviction was for the least offense punishable under the federal law, which did not constitute a serious felony strike." (*Id.* at p. 635.)

In contrast, the evidence in this case includes the judgment and commitment order, signed by the federal judge, which states that defendant pled guilty to "violation of 18 U.S.C. 2113(a)(d)(e), *armed bank robbery* and[]kidnapping." (Italics added.) This order is a reliable indicator of the conduct underlying his conviction. (See *Shepard v. United States* (2005) 544 U.S. ___, ___ [161 L.Ed.2d 205, 218 [facts of the crime can be established by the terms of a plea agreement or "some comparable judicial record"].) By specifying that defendant pled guilty to *armed bank robbery*, the judgment and conviction order was sufficient to establish that the conduct which

defendant admitted in pleading guilty satisfied the elements of the first paragraph of section 2113(a), the traditional elements of robbery under federal and California law.

Thus, unlike the generic judgment and commitment document in *Jones* that was unclear as to whether the appellant's conduct there violated the first or second paragraphs of section 2113(a), the judgment and commitment order in this case identified defendant's conduct as armed robbery, governed by the first paragraph of section 2113(a), and thus identified it as conduct that constitutes a strike under California law.

Defendant disagrees, in effect equating the description on the judgment and commitment order in this case with the description on the fingerprint card in *Jones*, i.e., the judgment and commitment order's description of defendant's crime as "armed bank robbery and[] kidnapping" is nothing more than a reference to the statute as a whole. We are not persuaded.

Section 2113 is not generically entitled "Bank robbery"; rather, it is entitled, "Bank robbery *and incidental crimes*" (italics added). Only the conduct described in the first paragraph of section 2113(a) satisfies the traditional elements of robbery. Thus, it must be said that the conduct described in paragraph two of section 2113(a) is one of the "incidental crimes" referred to in the title of the statute.

Because a fingerprint card is a nonjudicial document, the crime description placed on it lacks the reliability of the description of a conviction on a judgment and commitment order signed by a federal district judge. This order signed by United States District Judge Philip C. Wilkins is a quintessential judicial document that serves

to memorialize defendant's criminal conduct in that case. We presume Judge Wilkins properly performed his duty to accurately characterize the nature of the crime for which defendant was convicted. (Evid. Code, § 664.) And we presume Judge Wilkins knew the difference between bank robbery -- the elements of which are set forth in the first paragraph of section 2113(a) -- and the incidental crime, the elements of which are set forth in the second paragraph of the section. Thus, we presume Judge Wilkins would not have characterized defendant's crime as bank "robbery" if defendant's conduct had only satisfied the incidental crime in section 2113(a) that does not contain the elements of robbery. In other words, we presume the judgment and commitment order's description of defendant's criminal conduct as "bank robbery" was not simply a reference to the statute as a whole.

Because the judgment and commitment order constituted a reliable indicator of the factual basis for defendant's plea (that defendant committed a robbery of the bank), it is substantial evidence that defendant's federal crime in 1976 constituted a strike within the meaning of California's three strikes law.

For this reason, we need not decide whether the description of defendant's crime as including kidnapping and being armed, thereby making it a violation of section 2113(d) and 2113(e), constitutes substantial evidence that the crime was a strike. (See Pen. Code, § 1192.7, subds. (c)(8) [any felony in which defendant personally uses a firearm is a strike] and (c)(20) ["kidnapping" is a serious felony].)

DISPOSITION

The judgment is affirmed.

_____ SCOTLAND _____, P.J.

We concur:

_____ MORRISON _____, J.

_____ HULL _____, J.