

CERTIFIED FOR PUBLICATION  
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SIX

THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
WILLIAM LOUIS THOMA,  
  
Defendant and Appellant.

2d Crim. No. B170355  
(Super. Ct. No. 2003008254)  
(Ventura County)  
OPINION ON REHEARING

Silence is not always golden. When a superior court judge accuses a defendant of breaking just about every bone in a victim's body, one would expect some denial or minimization if the accusation were untrue. As we shall explain, statutory and decisional law are consistent with the meaning of what is left unsaid in a conversation: Silence in the face of an accusation is a tacit admission of the truth thereof.

William Louis Thoma appeals from the judgment entered following his guilty plea to possession of methamphetamine. (Health & Saf. Code, § 11377, subd. (a).) He was sentenced to prison as a "two-striker" and contends that his 1995 prior conviction of driving under the influence causing "bodily injury" in violation of Vehicle Code section 23153, subdivision (a), does not constitute a strike within the meaning of California's "Three Strikes" law. (Pen. Code, §§ 667, subds.(b)-(i), 1170.12.)<sup>1</sup> The issue is whether the record of the 1995 conviction, which was based on a guilty plea, shows that appellant

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

inflicted "great bodily injury" on the victim. (See § 1192.7, subd. (c)(8).) The trial court factually found that "great bodily injury" had been inflicted and that the conviction is a "strike." Appellant contends that the trial court relied upon inadmissible hearsay evidence to find that "great bodily injury" had been inflicted. Without this hearsay evidence, appellant argues, the evidence is insufficient to support the determination that the prior conviction is a strike. We disagree and affirm.

*Infliction of Great Bodily Injury Required for  
Prior Conviction to Qualify as a Strike*

Vehicle Code section 23153, subdivision (a), provides: "It is unlawful for any person, while under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver." "Bodily injury means just what it says - harm or hurt to the body. Common sense requires more for conviction than a "shaking up" of a person in a car which is in an accident, or fright, or a minor headache; it means very obviously a hurt to the body.'" (*People v. Dakin* (1988) 200 Cal.App.3d 1026, 1035.) "Bodily injury" does not mean substantial or "great bodily injury." (*Id.*, at p. 1036.)

A felony conviction for violating Vehicle Code section 23153, subdivision (a), constitutes a strike only if the defendant "personally inflicts great bodily injury on any person, other than an accomplice . . . ." (§ 1192.7, subd. (c)(8); see also §§ 667, subd. (d)(1), 1170.12 subd. (b)(1).) Thus, the People were required to show that appellant had inflicted "great bodily injury," something more than simple "bodily injury."

*Trial on the Prior Conviction*

At the trial on the prior conviction, the trial court received in evidence the information, the probation report, and transcripts of the preliminary hearing, guilty plea, and sentencing proceedings.

At the 1995 preliminary hearing a witness testified that appellant was riding a motorcycle and struck a pedestrian in a crosswalk. The pedestrian was "thrown out of the crosswalk." The only evidence of the pedestrian's injuries was a statement made by a nurse to a police officer. The officer testified that the nurse had "said that the victim was in surgery . . . for two fractured arms, two fractured legs and fractured clavical [*sic*] and blunt trauma to the head."

The 1995 plea and sentencing were combined in a single proceeding where the following transpired: "[The court:] [D]efendant is to pay restitution to the victim in this case. That restitution is currently unknown. She has massive injuries, 15 different breaks in the arm, two plates in her ulna, broken clavicle and which has been screwed back together again, multiple fractures of her face, upper jaw, suffered a concussion.<sup>[2]</sup>

[¶] Any idea what the restitution is? [¶] [Deputy District Attorney]: No, your honor. [¶] [Appellant's counsel]: Mr. Thoma says he got a bill, but he's not going to be working for a while. [¶] The court: I know. For quite some time. I will order that he pay restitution to the victim though in the maximum amount possible . . . . "

At the court trial on the prior, the People advanced two theories in support of its position that the record of the prior conviction shows that appellant inflicted great bodily injury on the victim. The first theory concerned the nurse's statement to the testifying police officer at the preliminary hearing. The second theory was that, by not disputing the description of the victim's injuries during sentencing on the prior conviction, appellant had made an adoptive admission of the truth of that description.

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<sup>2</sup> In describing the victim's injuries, the trial court relied on the probation report. The report states: "The victim was interviewed telephonically and stated that she has suffered memory loss from the accident. She further states that she suffered a compound fracture to her right leg and had rods placed in her leg, fracture to her right clavicle, fracture to her right ulna in which there are 15 different breaks and two plates in her ulna, right arm fracture in which she has one plate, left broken clavicle in which she has a screw in the clavicle, multiple fractures in her face, upper jaw and she suffered a concussion."

*Admissibility of Evidence to Prove Prior Conviction Allegation*

In determining the truth of a prior conviction allegation, the trier of fact may look to the entire record of the conviction, but no further. (*People v. Guerrero* (1988) 44 Cal.3d 343, 355-356.) The prosecution is "precluded from presenting any evidence *outside the record of conviction* to prove the circumstances of the prior crime." (*People v. Reed* (1996) 13 Cal.4th 217, 225.) The record of the prior conviction includes transcripts of the preliminary hearing, the defendant's guilty plea, and the sentencing hearing. (*Id.*, at p. 223; *People v. Abarca* (1991) 233 Cal.App.3d 1347, 1350; *People v. Smith* (1988) 206 Cal.App.3d 340, 345.)

"The normal rules of hearsay generally apply to evidence admitted as part of the record of conviction to show the conduct underlying the conviction. [Citation.]" (*People v. Woodell* (1998) 17 Cal.4th 448, 458.) Thus, a statement in the record of conviction that is offered to prove the truth of the matter stated must fall within an exception to the hearsay rule. (*People v. Reed, supra*, 13 Cal.4th at pp. 230-231.)

*Appellant Made an Adoptive Admission of the Truth  
of the Sentencing Court's Description of the Victim's Injuries*

Evidence Code section 1221 incorporates the adoptive admission exception to the hearsay rule. It provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." This evidentiary rule applies to criminal cases. (See e.g. *People v. Riel* (2000) 22 Cal.4th 1153, 1189; compare with 1 Witkin, Cal. Evidence (4th ed. 2000) Adoptive Admissions in Civil Cases, § 102, pp. 805-806.) The trial court impliedly ruled that appellant's silence at the 1995 sentencing hearing on the prior conviction was admissible as an adoptive admission of the truth of the sentencing court's description of the victim's injuries.

Appellant contends that the description of the victim's injuries could not have been the basis for an adoptive admission because the description "was not an 'accusation'

requiring a response." But "[f]or the adoptive admission exception to apply, . . . a direct accusation in so many words is not essential." [Citation.] "When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. [Citations.] His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence." [Citation.]" (*People v. Riel*, supra, 22 Cal.4th at p. 1189.)

A reasonable person in appellant's situation would have disputed the trial court's description of the victim's injuries if that description had been false. The description impliedly, if not expressly, accused appellant of inflicting "great bodily injury" on the victim. Since appellant was required to make restitution for those injuries, he had an interest in assuring that the trial court did not exaggerate them.

Furthermore, in 1995, appellant was advised that the prior conviction might qualify as a "strike" because of the gravity of the victim's injuries. Before appellant pleaded guilty, his own counsel stated: "This may very well be a strike in the future. We understand that." The trial court also told appellant: "You have to assume that it is [a strike]. That means in the future if you have any further felony conviction it will double the sentence. Do you understand that?" Appellant replied, "yes sir." During the taking of the guilty plea, the prosecutor warned appellant, and appellant again acknowledged that he "should assume that this conviction will constitute a strike, which means if you're convicted of felonies in the future, your sentence will be enhanced greatly."<sup>3</sup> If the

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<sup>3</sup> In view of these warnings and acknowledgements, appellant was not *truly* silent in the face of the trial court's accusation concerning the victim's injuries. We must view the evidence in the light most favorable to the judgment and draw all reasonable inferences in favor of the order finding that appellant suffered a strike in 1995. (e.g., 9 Witkin Cal. Procedure (4th ed. 1997) Appeal, § 359, pp. 408-410.) Appellant did not expressly admit having inflicted "great bodily injury" upon the victim. However, the trial court, sitting as trier of fact, drew the reasonable inference that the 1995 "strike" acknowledgements were based upon his having inflicted "great bodily injury." (*People v. Bohana* (2000) 84 Cal.App.4th 360, 368.) No other reasonable inference is permissible given traditional

victim's injuries were minor so that the conviction could not have constituted a "strike," a reasonable person in appellant's position would have disputed the sentencing court's characterization of the injuries as "massive." In fact, the injuries were so "massive" and the anticipated restitution amount so great, that the sentencing court stayed payment of the restitution fine so that appellant could concentrate on direct restitution to the victim.

Appellant maintains that his silence should not be construed as an adoptive admission because he was represented by counsel. Thus, he argues, "a response by him would have been inappropriate and would have violated courtroom decorum; rather, appellant could reasonably rely on his counsel to respond on his behalf." We disagree. Appellant's representation by counsel did not preclude the application of the adoptive admission exception to the hearsay rule. The description of the victim's injuries was given in appellant's presence. Appellant had the opportunity to respond either personally or through his counsel if the description was inaccurate.

Appellant argues that counsel may have made a "strategic" decision not to dispute the accuracy of the trial court's description because counsel "felt that it would antagonize the trial court unnecessarily to appear to quibble about the nature of the [victim's] injuries . . . ." But any reasonable counsel would not have hesitated to inform the court that its description of the victim's injuries was exaggerated. Correcting the description did not involve "quibbling," since appellant was required to make restitution to the victim for her injuries. Moreover, counsel was concerned that the conviction would constitute a "strike" because of the victim's injuries.<sup>4</sup>

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appellate rules. In these circumstances, the 1995 acknowledgements are tantamount to an admission that the victim suffered "great bodily injury."

<sup>4</sup> In his petition for rehearing, counsel contends: "The court's decision overlooks a problem it creates for future criminal and civil trials; parties, fearful that silence will be as an adoptive admission, will be driven to make frequent objections even where the objection does not bear upon an issue immediately before the court." We disagree that any such problem is created. While the issue of "great bodily injury" was not directly

Appellant contends that both the attorney-client privilege and the Fifth Amendment privilege against self-incrimination would be violated if his silence were construed as an adoptive admission. Appellant does not explain how the attorney-client privilege would be violated, and we can find no grounds supporting such a violation.

The Fifth Amendment privilege against self-incrimination precludes the admission of a defendant's silence as an adoptive admission if there is evidence that, by remaining mute, the defendant was exercising his constitutional right to remain silent. (*People v. Preston* (1973) 9 Cal.3d 308, 313-315.) The record contains no evidence from which it may be inferred that appellant's silence was based upon his constitutional right to remain silent. Only a few minutes earlier, appellant had waived his privilege against self-incrimination and had pleaded guilty. Accordingly, construing appellant's silence as an adoptive admission does not violate his Fifth Amendment privilege against self-incrimination.

Appellant argues that his not responding to the description of injuries should not be deemed an adoptive admission because "there is no evidence that appellant knew or should have known exactly what injuries he had inflicted upon the pedestrian he hit with his motorcycle. . . ." But the adoptive admission exception does not require proof that the party making the adoptive admission has actual knowledge that the facts stated are true. The only knowledge requirement is "knowledge of the content" of the statement that the party is allegedly adopting. (Evid. Code, § 1221; *People v. Silva* (1988) 45 Cal.3d 604, 623-624.) If, through silence, the party manifests a belief in the truth of the statement, the silence is admissible as an adoptive admission. Appellant had knowledge of the

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before the court in 1995, the record affirmatively shows that appellant, both counsel, and the trial court were all aware of the potential adverse consequences of the 1995 guilty plea and acknowledgements. Our opinion deals only with whether the record of conviction may include an adoptive admission to show a "strike" within the meaning of the "Three Strikes" sentencing scheme.

content of the court's statement describing the victim's injuries. By not responding to that description, he manifested a belief in its truth.

In any event, the trial court could have reasonably inferred that, at the time of sentencing on the prior conviction, appellant knew he had inflicted "great bodily injury." Otherwise, his counsel on the prior conviction would not have expressed concern that the conviction might constitute a "strike." Moreover, counsel said that appellant had received a bill for the victim's injuries. It was reasonable for the trial court to infer that the itemization and amount of the bill had made it clear that the victim had suffered "great bodily injury." Finally, the probation report for the prior conviction sets forth the victim's own description of the very serious nature of her injuries as a basis for the trial court's accusation. (See fn. 2, *ante*.) Appellant's counsel presumably read the report and discussed it with appellant prior to sentencing.

Accordingly, the trial court did not err in impliedly ruling that appellant's silence at the sentencing hearing was admissible as an adoptive admission of the truth of the sentencing court's description of the victim's injuries. In view of this adoptive admission, the evidence is sufficient to support the trial court's determination that the prior conviction is a "strike."

*Appellant's Adoptive Admission*

*Did not Violate his Confrontation Rights*

Appellant contends that the admission of hearsay evidence to prove the prior conviction violated his Sixth and Fourteenth Amendment rights because he was denied the opportunity to confront and cross-examine witnesses against him. Appellant relies on *Crawford v. Washington* (2004) 541 U.S. 36 (158 L.Ed.2d 177, 124 S.Ct. 1354). In *Crawford* the United States Supreme Court held that testimonial hearsay statements are admissible under the Sixth Amendment Confrontation Clause only if the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. failed to object on that ground in the trial court. But *Crawford* was decided after



appellant's trial on the prior conviction. "[T]he failure to object was excusable, (*Id.*, at p. 203,124 S. Ct. at p. 1374.)

The People contend that appellant waived the confrontation issue because he since governing law at the time of the [trial] afforded scant grounds for objection. [Citations.]" (*People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411, fn. 2; see also *People v. Turner* (1990) 50 Cal.3d 668, 703 ["Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change."].) Accordingly, we consider the confrontation issue on its merits.

The admission of appellant's adoptive admission did not violate his confrontation rights under *Crawford*. "[B]y reason of the adoptive admissions rule, once the defendant has expressly or impliedly adopted the statements of another, the statements become *his own admissions*, and are admissible on that basis as a well-recognized exception to the hearsay rule. [Citation.] Being deemed the defendant's own admissions, we are no longer concerned with the veracity or credibility of the original declarant. Accordingly, no confrontation right is impinged when those statements are admitted as adoptive admissions without providing for cross-examination of the declarant." (*People v. Silva, supra*, 45 Cal.3d at p. 624.)

#### *Reply to Dissent*

The dissent claims, as a matter of law, that the People failed to introduce admissible evidence that appellant's 1995 conviction constitutes a "strike." This is based on a charitable reading of the record in appellant's favor. An appellate court is required to draw inferences in favor of the trial court's rulings and all intendments are in favor of the judgment. (E.g. *People v Superior Court (Ramos)* (1991) 235 Cal.App.3d 1261, 1266, fn. 2.) The dissent does not do so. For example, it treats appellant's presence at sentencing as though he were in a sound-proof booth. To the contrary, each and every statement uttered at appellant's sentencing was directed to and concerned appellant and his future obligations.

At appellant's combined 1995 plea and sentencing hearing, appellant was expressly advised to assume, and he acknowledged, that the conviction could be used against him as a "strike" were he to offend in the future. Although not an issue to be definitively resolved at that time, appellant was placed on notice and did not object to the description of the victim's injuries. The trial court stayed the restitution fine so that appellant could concentrate on the "massive" restitution owed to the victim. A trial is a search for the truth and the inquiry surely continues at the sentencing hearing. The Evidence Code, including section 1221 (the adoptive admission section), is designed to achieve that truth and a just result.

Now, appellant seeks refuge in the 1995 hearing transcript. The dissent would afford him shelter. This would be an exaltation of form over substance. It is not too much to expect that either appellant or his attorney would have said something if the trial court's description of the victim's injuries was erroneous or overstated. The adoptive admission exception to the hearsay rule is not suspended simply because the accuser is a superior court judge. No "outburst" from appellant or his attorney would have been necessary. A simple statement that the victim's injuries were overstated is not too much to ask. A sentencing court should be pleased to have factual mistakes corrected.

The dissent draws the inference that counsel did not object because the monthly rate of restitution coming from prison wages was reasonable. Of course, there is another inference: both appellant and his attorney knew that appellant had broken just about every bone in the victim's body.

*Disposition*

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

YEGAN, J.

I concur:

COFFEE, J.

## GILBERT, J. DISSENTING

I respectfully dissent.

The majority and I agree on one point. The information the trial court relied upon in determining that defendant's prior was a strike is hearsay. If the hearsay evidence in either the preliminary hearing transcript or the probation report were a sandwich, it would be at least a double-decker.

My colleagues create an exception to the hearsay rule by adopting a novel but ill-advised version of the adoptive admission rule. This is one adoption that should not go through.

As in *People v. Reed* (1996) 13 Cal.4th 217, 224, "No evidence suggests that in his plea defendant was asked to, or did, admit any particular facts stated in the preliminary hearing or probation report, other than those facts necessary to the . . . charge itself. . . . [Appellant] pled guilty to an information, not to a preliminary hearing transcript."

In 1995, Thoma pled guilty to the offense but did not admit facts about the victim's injuries. Nor did the trial court say anything to Thoma about the victim's injuries. The court's remarks regarding the victim's injuries concerned restitution, and it directed a question to the prosecutor, "Any idea what the restitution is?" Under these circumstances, the majority posit that it would have been reasonable for Thoma to chime in with a protestation if he disagreed with the court's statement. In this setting such an outburst, in my view, would have been unreasonable.

Even tyro criminal trial lawyers know to advise their clients not to speak in court unless spoken to. Defendants who speak out are often admonished by the court to direct their comments or questions to their counsel. This admonition protects the defendant and ensures the orderly progression of the case.

The purpose of the restitution hearing was not to determine facts as to whether Thoma's prior conviction constitutes a strike. Thoma's silence under these

circumstances was not unreasonable. The trial court in 1995 did not ask him or even his counsel a question. It merely read from the probation report to determine restitution. Under these circumstances the court's statement did not amount to an accusation which called for a reply. (See *People v. Simmons* (1946) 28 Cal.2d 699, 712.) Nor did Thoma's silence lead to the inference stated in the emotionally charged language of the majority that he knew of the victim's injuries. At the time of the accident he had fallen from his motorcycle, "skidded down the center lane" and ended up "spread eagle in the road."

The majority further distort the adoptive admission rule by extending it to Thoma's counsel. No authority supports this unprecedented rule. Moreover, Thoma's counsel may have had good reason not to raise an objection to the court's discussion of the victim's injuries. As his current appellate counsel suggests, Thoma's trial counsel could have concluded that because his client did not oppose restitution at the modest rate of \$5.60 a month, an objection to the court's description of the victim's injuries was unnecessary. The majority, nevertheless, convert Thoma's silence into an admission for the purpose of enhancing his sentence, an issue not before the sentencing court in 1995. It is true, as the People point out, that the court at one point advised Thoma that his conviction might be a strike in the future, but the court also expressed doubt whether in fact the conviction was a strike.

The People failed to establish whether Thoma's prior conviction was a strike. This they failed to do. If the record fails to show the facts of the offense committed, the court will presume the prior conviction is for the least offense punishable. (*People v. Guerrero* (1988) 44 Cal.3d 343, 352.) That is what should happen here.

The issue is not whether defendant escapes punishment but whether the prosecution meets its burden of proof.

I would reverse and remand for a new hearing on the prior conviction.

CERTIFIED FOR PUBLICATION.

GILBERT, J.

Bruce A. Clark, Judge

Superior Court County of Ventura

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