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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CHARLES PERRY, Defendant and Appellant.	B169081 (Los Angeles County Super. Ct. No. BA241834)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ruffo Espinosa, Jr., Judge. Affirmed.

Kurt J. Pritz, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Margaret E. Maxwell and Marc A. Kohn, Deputy Attorneys General, for Plaintiff and Respondent.

Charles Perry appeals from judgment entered following a jury trial in which he was convicted of one count of selling heroin (Health & Saf. Code, § 11352, subd. (a)) and the court's finding that he suffered one prior strike conviction within the meaning of Penal Code sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d) and served one prior prison term within the meaning of Penal Code section 667.5, subdivision (b).) Sentenced to prison for a total of six years, he contends the true finding on appellant's prior strike conviction must be reversed for insufficient evidence.[1] For reasons explained in the opinion, we affirm.

FACTUAL AND PROCEDURAL SUMMARY

As the sufficiency of evidence to support the conviction is not in question, it will suffice to observe that during the afternoon on January 10, 2003, in the area of San Julian and Sixth Street in Los Angeles, undercover narcotics officer Jesus Olivares bought fifteen dollars of heroin from appellant, who was a "hook" or middleman in the drug transaction.

DISCUSSION

The amended information alleged that appellant, on July 3, 1997, suffered a prior conviction of a serious or violent felony within the meaning of the Three Strikes law for violating Penal Code section 245, subdivision (a)(1).[2]

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[1] Initially, he also contended the court erred in failing to instruct the jury on a lesser related offense; but in his reply brief, he concedes under the holding of *People v. Birks* (1998) 19 Cal.4th 108, 136-137, the trial court had no duty to so instruct.

[2] Penal Code section 245, subdivision (a)(1) provides: "Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a

Appellant contends the documents submitted to prove the prior "established that appellant was convicted, upon a plea of guilty, of violating . . . section 245, subdivision (a)(1), assault with a deadly weapon or assault by means necessary to produce great bodily harm.[] None of the referenced documents list any specific factual findings with respect to appellant's prior strike conviction." He claims the evidence was, therefore, insufficient to support the finding that the prior conviction for felony assault qualified as a strike.

For purposes of the Three Strikes law, an assault is a serious prior conviction if it was an "assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245[.]" (Pen. Code, § 1192.7, subd.(c)(31).) An assault on a civilian by means of force likely to produce great bodily injury does not qualify as a strike within the meaning of the Three Strikes law. (*People v. Haykel* (2002) 96 Cal.App.4th 146, *People v. Winters* (2001) 93 Cal.App.4th 273, and *Williams v. Superior Court* (2001) 92 Cal.App.4th 612.)

The evidence received at the trial of the strike prior conviction showed that appellant had been convicted of violating Penal Code section 245, subdivision (a)(1). Contained in the packet of materials received into evidence pursuant to Penal Code section 969b, is an abstract of judgment from San Bernardino County Central Branch, case number FSB14498 indicating a conviction on July 3, 1997 for violating Penal Code section 245, subdivision (a)(1) for the crime of "ASSAULT WITH DEA" and a sentence of two years in prison. The Department of Corrections fingerprint card in the packet also shows the charge of

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firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison . . . ."

Penal Code section 245, subdivision (a)(1) for the crime of "ASSAULT W/DEADLY WEAPON."

In *People v. Luna* (2003) 113 Cal.App.4th 395, 398-399, Division Five of this court concluded references to Penal Code section 245, subdivision (a)(1) and the notation "ASSLT GBI W/DLY WPN" in the abstract of judgment and the Department of Corrections fingerprint card "constituted substantial evidence defendant was previously convicted of assault with a deadly weapon; an offense now described in Penal Code section 1192.7, subdivision (c)(31)."

Here, we examine the record for substantial evidence that the July 3, 1997 conviction was for assault with a deadly weapon, a serious conviction, and find substantial evidence to support the finding. This case is even stronger than *Luna* in that the documentation received into evidence only mentioned assault with a deadly weapon.[3] Further, immediately prior to trial, defense counsel acknowledged the prior "was for assault with a deadly weapon, which is a strike." He noted that if it had been an assault by force likely to produce great bodily injury, he would not even be making a motion to strike the strike because it would not be a strike.[4]

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[3] The probation report filed in Superior Court on July 14, 2003, which was not received into evidence at trial, refers to the subject prior as a "violent felony conviction[]"and "245(A)(1) PC (force/adw not firearm: gbi likely)."

[4] In arguing that the strike should be stricken, defense counsel clarified that the prior was for an assault with a deadly weapon and stated, "Well, yes. And if it was likely to produce great bodily injury, I wouldn't be making a motion to strike the strike for legal grounds. [But] unfortunately it's not. It was for assault with a deadly weapon, which is a strike."

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P.J.

We concur:

HASTINGS, J.

CURRY, J.