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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. SAUL TERRELL, Defendant and Appellant.	B281605 (Los Angeles County Super. Ct. No. VA139595)

APPEAL from a judgment of the Superior Court of Los Angeles County. Raul Anthony Sahagun, Judge. Affirmed in part and reversed in part with directions.

Maggie Shrout, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Saul Terrell appeals from the judgment of his multiple convictions of assault with a firearm and kidnapping. Specifically, appellant argues that insufficient evidence supported the jury's true findings on firearm enhancement allegations and one of the assault convictions. As we shall explain, we disagree but remand this matter for resentencing in light of the Legislature's recent amendment to the law regarding the imposition of firearm enhancements. (Pen. Code, §§ 12022.5, 12022.53.)[1]

FACTUAL AND PROCEDURAL BACKGROUND

Shortly after midnight on July 11, 2015, appellant approached S.F., a security guard who stood at the entrance of a bar in south Los Angeles. Appellant placed a gun to S.F.'s head and dragged him into a liquor store next to the bar. As appellant and S.F. entered the liquor store, appellant yelled and demanded money while pointing the gun at S.F.'s face.

D.M., the owner of the liquor store, and his employee, R.B., saw appellant enter the store with S.F. R.B., who was familiar with guns, described appellant's weapon as a silver, long-barreled, semiautomatic gun. R.B. testified that when appellant saw him, he was about eight feet away from appellant at the time, and appellant pointed the gun at him and said, "I don't like you. I don't like the look of you." R.B. ducked out of appellant's line of sight and then escaped through the back of the store.

While appellant was momentarily distracted, S.F. tried to push the gun away from his head, but appellant struck S.F. in the face with the gun. S.F. begged for his life, and appellant released S.F., who ran out of the store.

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[1] All statutory references are to the Penal Code unless otherwise indicated.

Appellant then turned his attention to D.M., pointing the gun at him as he stood behind the counter. D.M. ran to the back of the store, but appellant caught him and hit D.M. on the head with the gun, injuring him. Appellant pointed the gun at D.M. and demanded money. D.M. gave him the money in his pockets. Appellant hit D.M. again with the gun, complaining that the money was not enough. D.M. then gave appellant approximately $500 from the cash register. Appellant demanded more money and pointed his gun at D.M.'s face; the gun made a clicking sound, but it did not fire. After D.M. gave appellant additional money, appellant ordered D.M. to the floor and appellant left the store.

Appellant was arrested and charged with three counts of assault with a firearm (§ 245, subd. (a)(2) [counts 1, 4, and 6]); kidnapping (§ 207, subd. (a) [count 2]); and second degree robbery (§ 212.5, subd. (c) [count 3]). The information further alleged appellant personally used a firearm in connection with counts 1–3 and 6. (§ 12022.53, subd. (b); §12022.5, subd. (a).)[2] The jury found appellant guilty of all charges and enhancements, and the court found the strikes and the prior allegations true. The court sentenced appellant to a total of 36 years 4 months in state prison, consisting of the high term of eight years for the kidnapping, doubled pursuant to section 667; an additional 10 years for the firearm enhancement and an additional five years pursuant to section 667, subdivision (a)(1). For the robbery conviction, the court sentenced appellant to an additional year, doubled under section 667, and an additional 3 years 4 months for the gun

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[2] In addition, the information alleged that appellant had a prior strike conviction pursuant to section 1170.12, subdivision (b) and a serious felony prior pursuant to section 667, subdivision (a)(1).

enhancement. The sentence and enhancement for the count 6 assault totaled 18 years; the court ordered that time to run concurrently with the other sentences.[3]

Appellant filed a timely notice of appeal.

DISCUSSION

I. Sufficient Evidence Supported the Firearm Enhancements and the Conviction of Assault with a Firearm

Our review of a challenge to the sufficiency of the evidence to support a conviction or enhancement requires an examination of the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. We presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment, and do not reweigh the evidence or reevaluate a witness's credibility. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

Appellant contends the prosecution presented insufficient evidence that he used a *real* gun in committing the crimes; he notes that authorities never recovered a gun and he did not fire the weapon. Thus, appellant asserts that the true findings on the firearm enhancements and his conviction of assault with a firearm against R.B. violated his constitutional rights to due process and a fair trial. We disagree.

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[3] The court stayed the sentence and enhancements on counts 1 and 4 assault convictions pursuant to section 654.

A. *Firearm Enhancements*

"[A]ny person who, in the commission of a felony . . . personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply." (§ 12022.53, subd. (b).) In this context, a " 'firearm' " is defined as "a device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of an explosion or other form of combustion." (§§ 12001, 16520.) Toy guns, pellet guns, and BB guns are not firearms within the meaning of this statute. (*People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1435 (*Monjaras*).)

"The fact that an object used . . . was a 'firearm' can be established by direct or circumstantial evidence." (*Monjaras, supra,* 164 Cal.App.4th at p. 1435.) In *Monjaras*, the defendant displayed the handle of a black pistol stuck in the waistband of his pants and demanded that the victim give him her purse. The victim had seen guns before but had not handled them; she assumed the weapon was real and complied with the defendant's demand. At trial, the victim testified that the gun was "[p]robably metal," but conceded that she could not tell whether it was real. (*Id.* at p. 1436.) The appellate court in *Monjaras* found this testimony sufficient to support a finding the gun was real. "The jury was not required to give defendant the benefit of the victim's inability to say conclusively the pistol was a real firearm. This is so because 'defendant's own words and conduct in the course of an offense may support a rational fact finder's determination that he used a [firearm].' [Citation.] Indeed, even though for purposes of section 12022.53, subdivision (b), a firearm need not be loaded or even operable, 'words and actions, in both verbally threatening

and in displaying and aiming [a] gun at others, [can] fully support[] the jury's determination the gun was sufficiently operable [and loaded].' " (*Monjaras, supra,* 164 Cal.App.4th at pp. 1436–1437.)

Here, appellant menacingly displayed a weapon, holding it to S.F.'s head and pointing it at R.B. and D.M. And appellant demanded money while brandishing the weapon, implying that if they did not comply with his demands, he would fire the gun. Also, R.B. testified that he was familiar with guns and could distinguish among types of firearms; he described the appearance of the gun, testifying that it was a silver, long-barreled semiautomatic gun. The inference that the item was a real gun is further supported by the fact that it was heavy enough to injure D.M.; appellant struck D.M. several times in the hand and head with the weapon, which broke D.M.'s hand and caused his head to bleed. These facts support an inference that the object appellant displayed during the commission of the crimes was a genuine gun.

B. *Conviction of Assault with a Firearm*

Appellant also argues that the evidence supporting the assault with a firearm conviction alleged in count 6 was insufficient because appellant was too far away from R.B. to assault him given that there was no evidence that the gun was loaded at the time.

An assault with a firearm cannot be committed by merely pointing an *unloaded* firearm at a victim. Direct evidence that the gun was loaded is not required, however. The defendant's words and conduct in the course of an offense may support a rational fact finder's determination that he used a loaded weapon. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3, 13; accord, *People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 536, 541-542 [defendant's act of pointing a gun at officers, with his finger on the trigger, was an implied assertion the gun was loaded]; *People v. Heckathorne*

(1988) 202 Cal.App.3d 458, 467 [threatening use of a firearm when gun is pointed at ground may be sufficient for a violation of section 245, subdivision (a)(1)].)

Applying these standards, we conclude that there was sufficient evidence for a jury to infer that appellant's gun was loaded; appellant brandished it at R.B. and the other victims in a manner that suggested as much. He pointed the gun directly at the victims and demanded money, creating the logical inference that they all were under threat of imminent gun violence. After striking D.M. with the gun several times, appellant pointed the gun at D.M.'s face at point-blank range, and the gun made a clicking sound from which the jury could infer that appellant had intended to fire the weapon. Also, the trier of fact could reasonably infer that appellant's statement to R.B., "I don't like you. I don't like the look of you," while pointing it at R.B., was an implied threat to shoot him. Thus, his statements and conduct amounted to an implied assertion that the gun was loaded and capable of harming R.B.

II. Remand For Resentencing in Light of Recent Amendments to Sections 12022.5 and 12022.53

In October 2017, the Legislature enacted Senate Bill No. 620. The bill amended sections 12022.5 and 12022.53, which define enhancements for defendants who personally use a firearm in the commission of certain felonies. Under Senate Bill No. 620, "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (Sen. Bill No. 620, §§ 1 & 2, amending §§ 12022.5, subd. (c) and 12022.53, subd. (h).) Before the enactment of Senate Bill No. 620, these enhancements were mandatory, and the trial court lacked the authority to strike or

dismiss them. (See, e.g., *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362-1363.)

Appellant contends, the Attorney General concedes, and we agree, that Senate Bill No. 620 applies retroactively to appellant. The Attorney General argues, however, that we need not remand for resentencing because the trial court would not have exercised its discretion to reduce appellant's sentences. The Attorney General cites *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*), in which the defendant requested that his case be remanded to the trial court for resentencing after our Supreme Court decided in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 that trial courts have the discretion to strike prior strikes in determining a defendant's sentence. The court in *Gutierrez* rejected the defendant's request, noting that the trial court indicated that it would not, in any event, have exercised its discretion to lessen the sentence and thus, no purpose would be served in remanding for reconsideration. (*Gutierrez, supra,* 48 Cal.App.4th at p. 1896.) The Attorney General argues here that by the same reasoning, there is no need to remand appellant's case, pointing out that the court remarked the case involved "gratuitous violence" and that the court chose the high term for three of the crimes and consecutive sentences for most of the crimes.

We are not persuaded. In *Gutierrez*, the trial court stated during the initial sentencing hearing that it would not have exercised its discretion to lessen the sentence even if it could do so. (*Gutierrez, supra,* 48 Cal.App.4th at p. 1896.) In contrast, here although the trial court sentenced appellant to the high term on all but one count, the court also imposed the 18-year sentence on count 6 concurrently with other sentences, and it did not express a specific desire to impose the maximum possible sentence or state

that it would impose the firearm enhancements even if it had the discretion to strike them. Furthermore, because the law at the time of sentencing did not allow the trial court to strike firearm enhancements, appellant had no reason to argue that the court should strike them. Consequently, remand for resentencing is appropriate.

DISPOSITION

The sentence enhancements imposed under Penal Code sections 12022.5 and 12022.53 on appellant's convictions are stricken. Upon remand, the trial court shall hold a sentencing hearing to consider whether to strike or dismiss those enhancements. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur.

CHANEY, J.

BENDIX, J.