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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

AARON HARDER RUDD,

Defendant and Appellant.

B282324

(Los Angeles County  
Super. Ct. No. SA089831)

APPEAL from a judgment of the Superior Court of Los Angeles County. Harry Jay Ford III, Judge. Affirmed in part and remanded with directions.

Heather J. Manolakas, 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, Paul M. Roadarmel, Jr. and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Aaron Harder Rudd appeals the judgment entered following a jury trial in which he was convicted of first degree residential robbery (Pen. Code,<sup>1</sup> § 211; count 1), first degree burglary (§ 459; count 2), possession of an assault weapon (§ 30605, subd. (a); counts 3 & 4), possession of a firearm by a felon (§ 29800, subd. (a)(1); counts 5 & 6), and false imprisonment (§ 236; count 7). The jury also found true the personal firearm use allegations as to counts 1 and 2. (§ 12022.53, subd. (b).) Thereafter, appellant admitted the prior conviction and prior prison term allegations. (§§ 667, subd. (a), 667.5, subd. (b), 1170.12.) The trial court imposed an aggregate sentence of 25 years 8 months.

Appellant contends the trial court committed prejudicial error in denying a pretrial defense motion to disclose the identity of the confidential informant. Because we conclude appellant forfeited this claim, we affirm the judgment of conviction. However, we remand the matter to the trial court to exercise its discretion to strike or impose the firearm enhancement in accordance with section 12022.53, subdivision (h), to strike or impose the prior serious felony enhancement under section 667, subdivision (a)(1), and to correct errors and omissions in the minutes and the abstract of judgment.

### **FACTUAL BACKGROUND**

On February 11, 2015, appellant broke into the second floor apartment of Cassia Beltran and John Dougherty by cutting through the screen on the window next to the front door. Dougherty was out, and Beltran had gone to bed. Around 11:00 or 11:15 p.m. Beltran heard scratching on the screen. Thinking

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

her cat was clawing on the screen, Beltran got up. As she walked into the hallway outside her bedroom, Beltran nearly ran into a tall man wearing a plaid shirt and dark clothing. A bandana covered his face below his eyes and he was wearing a baseball cap. The man was holding some type of assault weapon, which he pointed directly at Beltran. His demeanor was aggressive and brusque.

Pointing the gun at Beltran's chest, the intruder told her to be quiet and demanded her wallet, purse, phones, cash, ATM card, and any other valuables. The man's voice was distinctive, and Beltran immediately recognized it when she next heard it in court at a hearing in this case. At trial, Beltran was 100 percent certain that appellant's voice was the voice of the man who had broken into her apartment.

Appellant took Beltran's debit card and demanded the PIN, which she gave him. Appellant then barricaded Beltran in her bathroom. Through the door, Beltran could hear appellant ransacking the apartment.

Beltran remained in the bathroom two or three minutes after appellant had left before she forced the door open. The apartment was a mess; Beltran's and Dougherty's belongings were strewn all over the floor, the mattress was off its frame, and all the dresser drawers were open.

Beltran and Dougherty determined that an Apple laptop computer belonging to Dougherty, an iPad, two iPhones, and Beltran's wallet, purse, and medication were missing after the robbery. When Beltran contacted her bank to report her debit card stolen, she was informed that the card had just been used at a Chase Bank ATM in Marina del Rey, but the transaction had been declined because the PIN had been entered incorrectly three times.

Shortly after he was assigned to investigate the robbery, Detective Luis Jurado received a tip from a confidential citizen informant concerning appellant. Further investigation led the detective to review several prior booking photos of appellant. Thereafter, Detective Jurado obtained surveillance photos from Chase Bank showing someone attempting to use Beltran's debit card 10 to 15 minutes after the robbery at the ATM in Marina del Rey. That ATM was only two and a half miles from Beltran's apartment, and less than a two minute walk from appellant's boat slip in Marina del Rey. Comparing appellant's prior booking photos with the surveillance photos, Detective Jurado identified appellant as the person in the surveillance photos using Beltran's debit card.

Subsequently, in a search of the boat where appellant lived, police recovered Dougherty's computer, as well as an assault rifle, a loaded high capacity magazine, an extra box of ammunition, and clothing matching Beltran's description of the intruder's clothing. Police also located Beltran's iPad on the front passenger seat of appellant's car.

## **DISCUSSION**

### **I. Appellant Forfeited Any Claim that the Trial Court Abused Its Discretion in Failing to Allow Disclosure of the Identity of the Confidential Informant**

#### ***A. Relevant proceedings***

Prior to the start of the preliminary hearing in this case, the court noted for the record that there had been discussions about a confidential informant, and stated that it would not reconsider the prior court's order denying a discovery request pertaining to the informant. The trial court authorized a limited inquiry concerning the informant's role in the investigation, with

defense counsel conceding the defense was not entitled to the informant's identity.<sup>2</sup>

Thereafter, appellant filed a motion seeking the identity of the confidential informant. At the hearing before Judge Kathryn Solorzano, defense counsel argued that the tip from the informant was "the only thing connecting [appellant] to the crime," and, pursuant to *People v. Hobbs* (1994) 7 Cal.4th 948 (*Hobbs*), due process required disclosure of the identity of the informant because he or she was a "potential material witness" on the issue of defendant's guilt or innocence. The court set the matter for further hearing without ruling on the motion.

At the next hearing, the People opposed disclosure of the informant's identity on the ground that there was no evidence "he was present or near the location of the crime," and was therefore not "material." Again, the court did not rule on the motion, but stated it would review the preliminary hearing transcript and possibly conduct an in-camera hearing regarding the informant before rendering a decision on the issue.<sup>3</sup>

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<sup>2</sup> During the preliminary hearing, the prosecutor asked Detective Jurado how appellant had come to his attention during the investigation of the robbery. The detective responded that he had received information from a "confidential source." When defense counsel asked the detective on cross-examination how soon after the robbery the information about appellant was received, the detective invoked the privilege not to reveal the informant's identity, and the court prohibited any cross-examination on the subject.

<sup>3</sup> The court also heard and granted defense counsel's motion to withdraw as attorney of record. Turning the discovery file over

The matter came before Judge Harry Jay Ford III for jury trial. In a pretrial proceeding the court noted that the motion for disclosure of the informant's identity had been denied and cautioned counsel not to mention the informant at all. Defense counsel assured the court that while she would not directly ask about the confidential informant, she believed there were questions she could ask that would not violate the court's order.

Thereafter, during the defense cross-examination of Detective Jurado, defense counsel sought permission to ask the witness how he knew the person in the bank surveillance photos was the defendant, given that the detective had not had any prior interactions with the defendant. Defense counsel denied she was seeking disclosure of the informant's identity, pointing out that it was appellant's prior attorney, not trial counsel, who had requested the identity of the informant. Defense counsel stated she did not believe any court would have granted that motion. The court found that the reason the detective recognized appellant's face was neither relevant nor material to the detective's credibility.

At the start of the defense case, appellant moved to allow reference to the confidential informant. His attorney emphasized that she was not making a *Hobbs* motion, nor did she intend to ask who the person was, how the police worked with him or her, or whether this person was getting paid. She stated she would not seek to examine the informant because there was no legal basis to do so, but argued that "the jury should hear that it was

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to the public defender, the court indicated that it would be up to appellant's new attorney to handle any further discovery issues.

because of an informant that [the defendant] became a suspect.” Counsel added, “My understanding of the privilege is that the police are not required to disclose the identity of the informant,” and reiterated, “I’m not asking for the identity of the informant.”

After further discussion with the parties, the trial court ruled that the mere fact of a confidential informant’s existence is not privileged. The court permitted the limited inquiry defense counsel had proposed, and authorized defense counsel to examine Detective Jurado as to the timing of the tip relative to the robbery and the police review of appellant’s booking photos.

### ***B. Appellant’s Claim Is Forfeited***

Appellant contends the trial court committed prejudicial error in denying the motion to disclose the identity of the confidential informant. This claim was forfeited by appellant’s failure to obtain a ruling on the motion and trial counsel’s subsequent explicit and repeated abandonment of the request for disclosure of the informant’s identity.

Appellant’s failure to secure a ruling on his motion for disclosure of the informant’s identity precludes him from raising the issue on appeal. It is settled that “where a court, through inadvertence or neglect, neither rules nor reserves its ruling, the party who objected or made the motion must make an effort to have the court actually rule, and that when the point is not pressed and is forgotten the party will be deemed to have waived or abandoned the point and may not raise the issue on appeal.” (*People v. Brewer* (2000) 81 Cal.App.4th 442, 461; accord, *People v. Vargas* (2001) 91 Cal.App.4th 506, 534, quoting *People v. Roberts* (1992) 2 Cal.4th 271, 297 [“ ‘Because defendant failed to obtain a pretrial ruling on the issue and did not pursue his objection at trial, we will not address his contention, for it is procedurally barred’ ”].)

Appellant's contention that the trial court *implicitly* denied the motion is unavailing. Even were we to treat the trial court's assumption that the prior court had already ruled on the issue as a denial of the motion, we would nevertheless find the issue forfeited by trial counsel's express abandonment of the request for disclosure of the confidential informant's identity. As set forth above, trial counsel repeatedly disavowed any effort to obtain the identity of the confidential informant, making clear her view that the prior attorney's disclosure motion lacked any legal basis. Under these circumstances, we conclude the motion was withdrawn, the issue abandoned, and the claim forfeited on appeal.

## **II. The Enhancement Imposed for the Burglary Conviction Is Unauthorized**

Appellant contends and the Attorney General agrees that the firearm enhancement imposed on count 2 pursuant to section 12022.53, subdivision (b)<sup>4</sup> should be stricken because residential burglary is not listed as a qualifying offense in subdivision (a). We agree.

Section 12022.53, subdivision (a) lists 18 offenses to which the 10-year enhancement under subdivision (b) applies. Because residential burglary is not among these offenses, the

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<sup>4</sup> Section 12022.53, subdivision (b) provides: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), 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."



enhancement imposed on count 2 in this case is unauthorized. (*People v. Price* (2004) 120 Cal.App.4th 224, 243 [“A sentence is unauthorized when it could not lawfully be imposed under any circumstances in the particular case”].) We therefore remand the matter with directions that the trial court strike the firearm enhancement as to count 2.

**III. The Minute Order and the Abstract of Judgment Must Be Corrected to Accurately Reflect the Trial Court’s Oral Pronouncement of Sentence**

At the probation and sentencing hearing in this case, the trial court sentenced appellant to an aggregate term of 25 years 8 months in state prison. However, the minutes and the abstract of judgment do not accurately reflect the court’s oral pronouncement, recording instead an aggregate term of 24 years 4 months.<sup>5</sup>

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<sup>5</sup> The trial court calculated the sentence as follows: The court sentenced appellant to 23 years on count 1, consisting of the mid term of 4 years, doubled to 8 years for the strike prior (§ 1170.12), plus 10 years pursuant to section 12022.53, subdivision (b), and 5 years pursuant to section 667, subdivision (a)(1). On count 3, the court imposed a concurrent term of 2 years, doubled to 4 years for the strike prior (§ 1170.12). The court ordered a consecutive sentence on count 4, consisting of one-third the mid term of 24 months for 8 months, doubled to 16 months for the strike prior (§ 1170.12). Finally, the trial court imposed a consecutive term of 16 months (one-third the 24-month mid term, doubled) for the probation violation in Los Angeles Superior Court case No. SA078685. Sentence on the remaining counts was stayed. The aggregate sentence listed in the minute

“In a criminal case, it is the *oral pronouncement of sentence* that constitutes the judgment. [Citation.] To the extent a minute order diverges from the sentencing proceedings it purports to memorialize, it is presumed to be the product of clerical error. [Citation.] Likewise, the abstract of judgment ‘ “cannot add to or modify the judgment which it purports to digest or summarize.” ’ [Citations.] As with other clerical errors, discrepancies between an abstract and the actual judgment as orally pronounced are subject to correction at any time, and should be corrected by a reviewing court when detected on appeal.” (*People v. Scott* (2012) 203 Cal.App.4th 1303, 1324.)

Because the minutes and the abstract of judgment in this case diverge from the court’s oral pronouncement, we presume the variance to be the result of clerical error. We therefore remand the matter to the trial court to correct the minute order and the abstract of judgment to accurately reflect the oral pronouncement of sentence.

#### **IV. On Remand the Trial Court May Exercise Its Discretion to Strike the Firearm Enhancement as to Count 1**

Signed into law in 2017 and effective January 1, 2018, Senate Bill No. 620 (2017-2018 Reg. Sess.) amended section 12022.53 to give the trial court authority to strike, in the interest of justice, a firearm enhancement allegation found to be true. Subdivision (h) of the amended statute provides: “The court may, in the interest of justice pursuant to Section 1385 and at the time

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order and the abstract of judgment does not include the 16-month consecutive term for the probation violation.

of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (Stats. 2017, ch. 682, § 2.)

Appellant contends the case should be remanded to allow the sentencing court to consider whether to strike the firearm enhancement imposed pursuant to section 12022.53, subdivision (b). The parties agree that the amendment to section 12022.53 applies retroactively to nonfinal judgments under the rule of *In re Estrada* (1965) 63 Cal.2d 740, 745. But citing the court’s statement that it found the consecutive 10-year term appropriate given the facts of the case, the Attorney General contends remand is not required here because the record shows the trial court would not have exercised discretion to strike the firearm enhancement. We are unpersuaded. The record of the sentencing hearing shows that the court carefully weighed each of its sentencing choices and sought input from both the defense and prosecution as it exercised its discretion. We can discern no reason the court would not have followed the same procedure had it believed it had discretion to strike the firearm enhancement here.

“Remand is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.] Without such a clear indication of a trial court’s intent, remand is required when the trial court is unaware of its sentencing choices.” (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110; see *People v. Gutierrez* (1996) 48 Cal.App.4th 1894.) On the record in this case, we cannot say that no reasonable court would strike the firearm enhancement, and we will not speculate as to how the trial court here might have exercised its discretion.

Accordingly, on remand the trial court may consider whether to exercise its discretion to strike the firearm enhancement as to count 1 in accordance with section 12022.53, subdivision (h).

**V. On Remand the Trial Court Also Has Discretion to Reconsider Imposition of the Five-Year Enhancement Under Section 667, subdivision (a)(1)**

On September 30, 2018, the Governor signed Senate Bill No. 1393,<sup>6</sup> which amends sections 1385 and 667 to give trial courts discretion to strike the five-year enhancement under section 667, subdivision (a)(1). The law becomes effective on January 1, 2019. After that date, the legislation will apply retroactively to cases in which judgment is not yet final on appeal. (See *People v. Brown* (2012) 54 Cal.4th 314, 323 “[w]hen the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute’s operative date”].)

Prior to Senate Bill No. 1393, section 1385, subdivision (b), expressly prohibited a trial court from striking “any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.” (*People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045, [under § 1385, subd. (b), trial court has no discretion to strike § 667, subd. (a) enhancement].) Senate Bill No. 1393 eliminates this restriction.

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<sup>6</sup> Stats. 2018, ch. 1013, §§ 1–2.

In the context of Senate Bill No. 620, as discussed above, courts have held that remand is required absent a clear indication that the trial court would *not* have reduced the sentence if it had been aware of its discretion to do so. (*People v. Almanza, supra*, 24 Cal.App.5th at p. 1110.) The trial court gave no such indication here. Accordingly, on remand, the trial court may consider whether to exercise its discretion to impose or strike the five-year prior serious felony enhancement under section 667, subdivision (a)(1).<sup>7</sup>

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<sup>7</sup> Because appellant’s judgment will not be final until he has exhausted all of his appeal rights, there appears no possibility the judgment will be final by January 1, 2019. (*People v. Vieira* (2005) 35 Cal.4th 264, 306 [“ ‘for the purpose of determining the retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed’ ”].) Accordingly, on remand *after* January 1, 2019, the trial court may reconsider imposition of the five-year enhancement under section 667, subdivision (a)(1) pursuant to Senate Bill No. 1393. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 973.)

### **DISPOSITION**

The judgment of conviction is affirmed. The matter is remanded with directions that (1) the trial court strike the Penal Code section 12022.53 enhancement imposed on count 2; (2) exercise its discretion to impose or strike the section 12022.53, subdivision (b) firearm enhancement with respect to count 1; (3) exercise its discretion to impose or strike the five-year section 667, subdivision (a)(1) prior serious felony enhancement; and (4) correct the minutes and the abstract of judgment to conform to the trial court's oral pronouncement at sentencing and in accordance with the orders set forth herein. The trial court is further ordered to forward the corrected abstract of judgment to the California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.