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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CUSTODIO ESPINOSA, Defendant and Appellant.	B281664 (Los Angeles County Super. Ct. No. YA093871-01)

APPEAL from a judgment of the Superior Court of Los Angeles County, Steven R. Van Sicklen, Judge. Affirmed in part as modified; remanded with directions.

Laurie Suzanne Wilmore, 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, Senior Assistant Attorney General, Steven D. Matthews and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant Custodio Espinosa of second degree robbery (Pen. Code,[1] §§ 211, 212.5, subd. (c)), a felony, and carrying a switchblade knife on his person (§ 21510, subd. (b)), a misdemeanor. The jury further found true an allegation defendant personally used a handgun during the robbery. (§ 12022.53, subd. (b).) The trial court found true a prior serious felony conviction allegation and two prior separate prison term allegations. (§§ 667, subd. (a)(1), 667.5, subd. (b).)

On appeal, defendant argues that the trial court erred by: (1) excluding an out-of-court statement by a co-arrestee; (2) instructing the jury about possession of stolen property; and (3) imposing two prior prison term enhancements. Defendant also argues this case should be remanded so that the trial court may exercise its discretion to dismiss the firearm enhancement under subdivision (h) of section 12022.53 as amended by Senate Bill No. 620 effective January 1, 2018. We modify the judgment to strike the prior prison term enhancements and remand the matter to allow the trial court to exercise its discretion whether to dismiss or strike defendant's firearm enhancement. We otherwise affirm the judgment.

II. THE EVIDENCE

At 5:15 a.m. on March 8, 2016, the victim, Shirley Salanga, was outside a friend's Lawndale home. Salanga and her friend

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[1] Further statutory references are to the Penal Code unless otherwise noted.

had just returned from the airport. They were trying to get the friend's garage door to close. Salanga noticed a dark, two-door car come to a slow stop across the street. She could not see who was driving the vehicle. A male Hispanic, bald, wearing a tan jacket got out from the front passenger side. He came toward Salanga but then disappeared out of sight. Salanga did not see his face.

Salanga parted company with her friend and walked toward her car, which was parked on the street. The man in the tan jacket—whom she later identified as defendant—approached her, pointed a small silver revolver at her and demanded her purse. Salanga was face-to-face with her assailant; she could clearly see his face. She handed him her purse and ran. She heard a car door open. The car sped away.

Salanga told a 911 operator she had been robbed by "a Mexican guy in a jacket." She further described the perpetrator as male, Hispanic, bald, about five-foot nine inches tall. Defendant matched Salanga's description; he is five feet nine inches tall. Approximately 24 hours later, Salanga immediately identified defendant as the robber after carefully considering photographs of six individuals. At trial, Salanga testified defendant was the man who robbed her. She was certain defendant was the perpetrator.

On March 9, just after midnight, Los Angeles sheriff deputies executed a traffic stop of a silver Chrysler 300. Karina Medina was driving. Defendant was in the front passenger seat. Salanga's driver's license and credit cards were in the center console together with like items in other individual's names. There was also a key to a room at an inn about a block away. The room had been rented to a female whose name matched one

of the driver's licenses found in the car. Salanga's purse was underneath the bed in the room. At trial, Salanga identified the jacket defendant was wearing when arrested as the same jacket he wore during the robbery.

III. DISCUSSION

A. *Evidence Code Section 1230*

After officers found the driver's licenses and credit cards in the car console, they asked Medina where she had obtained these items. Medina stated "I took it from my cousin because she gets involved in illegal activities." Medina did not appear at trial. Defendant sought to introduce her hearsay statement under the hearsay exception in Evidence Code section 1230 for a statement that "when made . . . so far subjected [the declarant] to the risk of . . . criminal liability . . . that a reasonable [person] in his [or her] position would not have made the statement unless he [or she] believed it to be true." The trial court refused to admit the statement.

Our review is for an abuse of discretion and we find none. (*People v. Grimes* (2016) 1 Cal.5th 698, 711.) The rationale underlying the hearsay exception in Evidence Code section 1230 is as follows: "When hearsay evidence is admitted it is usually because it has a high degree of trustworthiness. [Citations.] . . . [A] person's interest against being criminally implicated gives reasonable assurance of the veracity of his statement made against that interest." (*People v. Spriggs* (1964) 60 Cal.2d 868, 874.) "To demonstrate that an out-of-court declaration is admissible as a declaration against interest, '[t]he proponent of

such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.' [Citation.] 'In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation.]" (*People v. Grimes, supra*, 1 Cal.5th at p. 711.)

Even assuming Medina was unavailable—an issue we need not decide—her hearsay statement was not admissible as a statement against her penal interest. Medina's statement that she took the driver's licenses and credit cards from her cousin *because* her cousin gets involved in illegal activities, can fairly be interpreted to mean that she took the items from her cousin in order to prevent her cousin from further illegal activity. While implicitly admitting that she knew the items were illegally obtained, Medina disavowed any intent to unlawfully use these items, proffering that she had taken them in order to prevent her cousin from using them. Accordingly, the statement was self-serving and therefore does not satisfy the requirements of section 1230. (*People v. Duarte* (2000) 24 Cal.4th 603, 614, citing *People v. Shipe* (1975) 49 Cal.App.3d 343, 354 ["a declaration must be distinctly against the declarant's penal interest 'and must be clothed with indicia of reliability'"].) There was no abuse of discretion.

Further, contrary to defendant's objection, the trial court could consider Medina's criminal history in reaching its

conclusion. It is not clear to what extent the trial court did so. In any event, "'In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation.]" (*People v. Geier* (2007) 41 Cal.4th 555, 584.) Medina's criminal history was relevant to her possible motivation to make the statement.

Defendant cites *Chambers v. Mississippi* (1973) 410 U.S. 284, 302, and *Green v. Georgia* (1979) 442 U.S. 95, 97 for the proposition that excluding Medina's statement under state evidence rules violated his due process rights. In *Chambers* and *Green*, the United States Supreme Court held exclusion of hearsay evidence that was trustworthy and highly relevant to a critical issue violated the defendants' due process rights. Defendant's reliance on that decisional authority is misplaced. As discussed above, Medina's hearsay statement was not so inculpatory as to be persuasively trustworthy. Nor was it highly relevant or critical to defendant's misidentification defense. Defendant matched Salanga's description of the robber. Salanga repeatedly identified defendant as the perpetrator. Defendant was stopped 17 hours after the robbery, wearing a jacket matching that worn by Salanga's assailant. He was in a vehicle in close physical proximity to Salanga's stolen property. Further, there was circumstantial evidence Medina had rented the motel room where Salanga's purse was found and the jury could reasonably infer defendant had also been staying there. Medina's claim she obtained the stolen property from her cousin had

minimal persuasive value in light of the compelling evidence of defendant's guilt.

Defendant argues he was prejudiced by trial counsel's inability to produce evidence of Medina's statement after, in opening statement he described it to the jury. He cites no authority for the proposition that the trial court was required to admit the hearsay statement because counsel mentioned it in opening statement. Moreover, we see no prejudice as the court instructed the jury, "Do not consider for my [*sic*] purpose any offer of evidence that is not admitted . . . Treat it as though you'd never heard of it." Finally, given the compelling evidence of defendant's guilt, trial counsel's inability to make good on his description of the evidence to be presented did not prejudice his client.

B. *CALCRIM No. 376*

Over defendant's objection, the trial court instructed the jury with CALCRIM No. 376 as follows: "If you conclude that the defendant knew he possessed property and you conclude that the property had in fact been recently stolen, you may not convict the defendant of robbery based on those facts alone. However, if you also find that supporting evidence tends to prove his guilt, then you may conclude that the evidence is sufficient to prove he committed robbery. [¶] The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove his guilt of robbery. [¶] Remember that you may not convict the defendant of any crime unless you are convinced that

each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt."

Defendant objected to the trial court instructing the jury with CALCRIM No. 376 on grounds there was insufficient evidence defendant possessed the stolen property; further, the instruction that supporting evidence need only be slight, lowered the prosecution's burden of proof. The second assertion has been decided adversely to defendant. (Cf. *People v. Seumanu* (2015) 61 Cal.4th 1293, 1351; *People v. Rogers* (2013) 57 Cal.4th 296, 336 [CALJIC No. 2.15][2].) We need not reach the merits of defendant's first contention, that there was insufficient evidence he possessed the stolen items because they were found in a center console and not in plain view, because we conclude that any error in delivering this instruction was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) ""In

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[2] CALJIC No. 2.15 corresponds to CALCRIM No. 376. CALJIC No. 2.15 states: "If you find that a defendant was in [conscious] possession of recently [stolen] [extorted] property, the fact of that possession is not by itself sufficient to permit an inference that the defendant is guilty of the crime of _____. Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt. [¶] As corroboration, you may consider [the attributes of possession—time, place and manner,] [that the defendant had an opportunity to commit the crime charged,] [the defendant's conduct,] [[his] [her] false or contradictory statements, if any,] [and] [or] [other statements [he] [she] may have made with reference to the property] [a false account of how [he] [she] acquired possession of the stolen property] [any other evidence which tends to connect the defendant with the crime charged]."

determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.'"'" (*People v. Yoder* (1979) 100 Cal.App.3d 333, 338.)" (*People v. Jo* (2017) 15 Cal.App.5th 1128, 1172.)

Here, the trial court also delivered CALCRIM No. 200: "Some of these instructions may not apply depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." As discussed above, given the compelling evidence of defendant's guilt, any instructional error was harmless.[3]

C. *Cumulative Error*

Defendant contends he is entitled to reversal because of cumulative error. "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People*

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[3] Defendant argued for the first time at oral argument that if the court was going to deliver CALCRIM No. 376, it was additionally required to deliver CALCRIM No. 1750, which describes the elements for receiving stolen property in violation of section 496, subdivision (a). "[C]ontentions raised for the first time at oral argument are disfavored and may be rejected solely on the ground of their untimeliness." (*People v. Harris* (1992) 10 Cal.App.4th 672, 686.) In any event, we need not reach the merits of this argument as we determine that any error in delivering CALCRIM No. 376 was harmless.

v. Hill (1998) 17 Cal.4th 800, 844.) We find no series of errors. Moreover, any assumed error in delivering CALCRIM No. 376 was harmless. Therefore, we reject defendant's argument the cumulative effect of the trial court's errors requires reversal. (*People v. Melendez* (2016) 2 Cal.5th 1, 33.)

D. *Prior Separate Prison Term Enhancement*

The prior separate prison term enhancement, section 667.5, subdivision (b), provides: "Except where subdivision (a) applies, where the new offense is any felony for which a prison sentence . . . is imposed . . . , in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term . . . for any felony; provided that no additional term shall be imposed under this subdivision for any prison term . . . prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and prison custody . . . ." "The sentence enhancement requires proof that the defendant "'(1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction.'" [Citations.]" (*People v. Abdallah* (2016) 246 Cal.App.4th 736, 742.)

Defendant entered a plea in 2006 to firearm possession with a prior and was sentenced to 32 months in state prison. (Case No. YA063192.) He was discharged on parole on June 30, 2010. Less than five years later, on December 2, 2012, defendant committed a burglary. He entered a plea on December 19, 2012

to second degree commercial burglary and was sentenced to three years in state prison. (Case No. YA086070.) He was discharged from prison on August 27, 2014. On June 18, 2015, defendant's felony conviction in the 2012 burglary case (case No. YA086070) was reduced to a misdemeanor under section 1170.18 (Prop. 47).

Defendant's felony conviction in the burglary case (case No. YA086070) was reduced to a misdemeanor prior to his sentencing in this case. As a result, that conviction no longer satisfied the first element of section 667.5, subdivision (b), and defendant's one-year prior separate prison term enhancement premised on that case must be stricken. (*People v. Call* (2017) 9 Cal.App.5th 856, 862; *People v. Kindall* (2016) 6 Cal.App.5th 1199, 1205; *People v. Abdallah, supra*, 246 Cal.App.4th at p. 746.)

Defendant's prior separate prison term enhancement premised on the 2006 firearm case (case No. YA063192) must also be stricken. Once the trial court reduced defendant's 2012 burglary conviction (case No. YA086070) to a misdemeanor, defendant no longer had committed an offense (the 2012 burglary) that resulted in a *felony* conviction within five years of his June 30, 2010 release from custody in the 2006 firearm possession case (case No. YA063192). (*People v. Abdallah, supra*, 246 Cal.App.4th at pp. 744-746.) The Attorney General argues *Abdallah* was wrongly decided in this regard. We disagree.[4]

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[4] We note that the Attorney General did not petition for review in *Abdallah*. Our Supreme Court is considering a closely related issue in *People v. Valenzuela,* review granted March 30, 2016, S232900.

E. *Firearm Enhancement: Senate Bill No.* 620

Defendant contends the trial court now has discretion, under Senate Bill No. 620, effective January 1, 2018, to strike the section 12022.53, subdivision (b) ten-year firearm enhancement in this case. We agree. Senate Bill No. 620 applies to all non-final judgments. (*People v. Brown* (2012) 54 Cal.4th 314, 324; *People v. Francis* (1969) 71 Cal.2d 66, 76; *In re Estrada* (1965) 63 Cal.2d 740, 745, 747-748.)

The Attorney General argues a remand for resentencing is not required. This is a close case but we disagree. It is true the trial court denied defendant's *Romero* motion, found no mitigating circumstances and imposed the maximum possible sentence—the high term for robbery and a consecutive six-month term for the misdemeanor (in addition to mandatory enhancements). The trial court described the robbery as "a violent, serious crime." The trial court noted defendant committed the robbery soon after his release from parole; further, defendant's criminal history included domestic violence and a number of offenses involving firearms. The court described defendant as "very, very dangerous." However, the trial court also commented during sentencing: "There's a mandatory ten years that has to be imposed on the gun allegation. . . . I cannot strike the gun allegation." Under these circumstances, we cannot conclude that no purpose would be served by remanding. We believe there is a reasonable possibility the trial court would strike the enhancement. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.) Accordingly, we will remand for the trial court to determine whether it wishes to resentence defendant.

IV. DISPOSITION

The judgment is modified to strike the one-year prior separate prison term enhancements (Pen. Code, § 667.5, subd. (b)) premised on case Nos. YA086070 and YA063192. The judgment is affirmed in all other respects. On remand the trial court may, if it so chooses and within the confines of Penal Code section 1385, exercise its discretion regarding whether to strike defendant's Penal Code section 12022.53, subdivision (b) firearm enhancement.

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KIM, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.