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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.

ERIC TYRONE CARTER et al.,

Defendant and Appellant.

B275973

(Los Angeles County
Super. Ct. No. BA 419941)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Affirmed in part, reversed in part.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant Eric Tyrone Carter.

J. Kahn, under appointment by the Court of Appeal, for Defendant and Appellant Rasheen Childs.

Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant Bryant S. Moore.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants and defendants Eric Tyrone Carter, Rasheen Childs, and Bryant S. Moore committed a string of armed robberies of stores and restaurants in December 2013 and January 2014. Childs was involved in all of the robberies, and in most cases, he was the one who drew a handgun and demanded money from the cashier. Moore aided Childs in several robberies between December 11 and December 25, including one on December 22 in which Childs shot and killed a store clerk who attempted to flee. Thereafter Carter, not Moore, aided Childs in several additional robberies between December 27 and January 2. The defendants challenge several aspects of their convictions.

We reverse Moore's sentence of life imprisonment without the possibility of parole (LWOP) because there was insufficient evidence to support the jury's finding of a special circumstance with respect to Moore's involvement in the murder of Garcia. We remand Carter's and Childs's cases for resentencing in light of the Legislature's recent amendment to the law regarding imposition of handgun enhancements. (Pen. Code, § 12022.53.)¹ Furthermore, we correct certain errors regarding the abstracts of judgment and calculation of credits for Childs and Moore. In all other respects, we affirm.

FACTS AND PROCEEDINGS BELOW

In the space of approximately three weeks, from December 11, 2013 until January 2, 2014, Childs committed 18 armed robberies, along with one attempted robbery in which Childs shot and killed Gonzalo Garcia, a cashier at a convenience store. Childs and Moore committed 11 of these robberies together, including the incident in which Garcia was killed, and two robberies

¹ Unless otherwise specified, subsequent statutory references are to the Penal Code.

after the murder. Thereafter, in seven other robberies, Carter was Childs's accomplice.

Most of the robberies followed a similar pattern, albeit with some variation. Childs would enter a business accompanied by either Moore or Carter. Childs would pull out a gun, jump across the counter so that he was standing next to the cashier, and demand money. In some cases, Moore or Carter would stand guard and alert Childs to any potential trouble, while in others, Moore or Carter walked around to the register to assist Childs.² After the cashier had handed over the money in the register and sometimes from the store's safe, Childs and his accomplice would flee.

The trial court empanelled two separate juries in the case. One jury, which decided Childs's and Moore's cases, heard evidence regarding all the robberies. The other jury, which decided Carter's case, heard only the evidence that pertained to the robberies that Carter and Childs committed together.

The first jury convicted Childs of one count of first degree murder and found true an LWOP special circumstance (Pen. Code, §§ 187, 190.2, subd. (a)(17)). The jury also found that Childs personally discharged a firearm during the murder, and convicted him of attempted second degree robbery of Garcia, the murder victim. (§§ 664, 211, 12022.53.) In addition, the jury found Childs guilty of 15 counts of second degree robbery in which Childs personally used a firearm in the commission of the offense (§§ 211, 12022.53, subd. (b)), three more counts of second degree robbery in which a principal was armed with a firearm (§§ 211, 12022, subd. (a)(1)), and a single count of felony false imprisonment in which Childs personally used a firearm. (§§ 236, 12022.5, subd. (a)(1).) The court sentenced Childs to LWOP for the

² In three instances, Carter held the gun, rather than Childs.

special-circumstance murder conviction, plus a consecutive term of 79 years 8 months for the remaining convictions.

The same jury that convicted Childs also found Moore guilty of one count of first degree murder with a special circumstance (§§ 187, 190.2, subd. (a)(17)), along with attempted second degree robbery of Garcia. (§§ 664, 211.) The jury also convicted Moore of 10 counts of second degree robbery (§ 211) and a single count of felony false imprisonment. (§ 236.) The jury also found true allegations that a principal was armed with a firearm during the commission of all of these offenses. (§ 12022, subd. (a)(1).) The court sentenced Moore to LWOP for first degree murder with a special circumstance, plus a consecutive sentence of 19 years in prison for the other convictions.

The second jury convicted Carter of seven counts of second degree robbery. (§ 211.) With respect to three of the counts, the jury found true allegations that Carter personally used a firearm in the commission of the robberies (§ 12022.53, subd. (b)), and found true allegations that a principal had been armed in the four remaining robberies. (§ 12022, subd. (a)(1).) The court found that Carter had a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12), a prior serious felony conviction (§ 667, subd. (a)(1)), and one prison prior. (§ 667.5, subd. (b).) The court imposed a total sentence of 39 years 8 months in prison, calculated as follows: on one count of armed robbery (count 28), the middle term of three years, doubled to six years due to the prior strike, plus 10 additional years for the enhancement for personal use of a weapon, for a total of 16 years. (§ 12022.53, subd. (b).) On two additional counts of armed robbery (counts 14 and 26), the identical sentence described above, multiplied by one-third, for a term of 5 years 4 months each. On four additional counts (counts 10, 11, 24, and 27), two years each, consisting of one-third the midterm of each offense, doubled. In addition, the court imposed a five-year

term for the prior serious felony. The court ordered Carter to serve all these terms consecutively.

Defendants' contentions on appeal pertain only to some of these offenses: the murder and attempted robbery of Garcia on December 22, 2013 (counts 1 and 2); a false imprisonment conviction arising from a robbery on December 23, 2013 (count 19); a firearm enhancement resulting from a robbery on December 24, 2013 (count 20); and another robbery on December 25, 2013 (counts 22 and 23). We describe the facts of each offense below, in the relevant sections of the discussion.

DISCUSSION

The three defendants in this case have raised several contentions. Childs contends that there was insufficient evidence to support the jury's finding that he personally used a firearm in a robbery on December 24, 2013. Moore contends that there was insufficient evidence to show he acted with reckless indifference to human life and was a major participant in the attempted robbery of Garcia, and, therefore, that the finding of a special circumstance and consequent LWOP sentence for the murder of Garcia cannot stand. Childs and Moore both contend that there was insufficient evidence to support their convictions for felony false imprisonment of an employee who was present during the robbery of a Yoshinoya restaurant. Childs and Moore both contend that there was insufficient evidence that they were the robbers of a gas station on December 25, 2013. Childs and Moore also request that we correct various errors in their abstracts of judgment and calculation of credit for time served. Childs and Carter contend that they are entitled to resentencing in light of the Legislature's recent enactment of Senate Bill No. 620 (2017-2018 Reg. Sess.) (Senate Bill No. 620), which gives trial courts the discretion to strike

firearm enhancements when imposing sentence. We affirm in part and reverse in part, as we explain below.

**I. SUFFICIENCY OF THE EVIDENCE OF
SPECIAL CIRCUMSTANCE OF MURDER
OF GARCIA**

The jury convicted Moore of first-degree murder for his role in the attempted robbery in which Childs shot and killed Garcia. In addition, the jury found true the prosecution's allegation that a special circumstance applied to Moore. (See § 190.2.) On the basis of this finding, the trial court sentenced Moore to LWOP. Because Moore did not personally kill Garcia, in order for the special circumstance to apply, the prosecution was required to prove that Moore acted with reckless indifference to human life and was a major participant in the underlying felony. (§ 190.2, subd. (d).) Moore challenges the sufficiency of the evidence on both of these points.

We agree with Moore with regard to the showing of reckless indifference to human life. Although Moore was undoubtedly guilty of first-degree felony murder for his participation in the robbery, guilt as an aider and abettor by itself is insufficient to support an LWOP sentence. (See *People v. Clark* (2016) 63 Cal.4th 522, 616 (*Clark*).) The prosecution must also prove that Moore showed “a willingness to kill (or to assist another in killing) to achieve a distinct aim.” (*Id.* at p. 617.) Because there was insufficient evidence of this element, we reverse the finding of a special circumstance and Moore's LWOP sentence.

A. Relevant Facts

At around 10:20 p.m. on December 22, 2013, Childs and Moore attempted to rob a 7-Eleven on North Figueroa Street. During the course of the robbery, Childs shot and killed Garcia, the store's cashier. The evidence of the killing consisted primarily of

the testimony of a customer who witnessed the shooting and of video surveillance footage.

The surveillance footage depicts two men, identified as Childs and Moore, walking side by side to the counter behind which stood the cashier. The man identified as Childs pulls his handgun out of his pocket, then leaps over the counter toward Garcia. The man identified as Moore remains in the area in front of the register and watches as Garcia backs away from Childs. When Garcia turns his back and begins to run away, Childs shoots him. Moore then walks out the front door of the store, followed by Childs.

The customer who witnessed the shooting identified Childs from a photo lineup and in court, and identified Moore's photograph as the one that "look[ed] most familiar" to him.

**B. *Special Circumstances Applicability to
Aiding and Abetting a Felony Murder***

A defendant who is guilty of first degree murder may be sentenced to LWOP if a special circumstance applies. (§ 190.2, subd. (a).) We review a challenge to the sufficiency of the evidence of a special circumstance under the same standard we apply to other claims of insufficient evidence. We ask "whether, when evidence that is reasonable, credible, and of solid value is viewed 'in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt.'" (*People v. Dickey* (2005) 35 Cal.4th 884, 903 . . . ; see *People v. Halvorsen* (2007) 42 Cal.4th 379, 419) The standard is the same under the state and federal due process clauses. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1082-1083) We presume, in support of the judgment, the existence of every fact the trier of fact could reasonably deduce from the evidence, whether direct or circumstantial." (*Clark, supra*, 63 Cal.4th at p. 610.)

A special circumstance may apply to murder when the victim is killed in the commission of one of several felonies, including attempted robbery. (See § 190.2, subd. (a)(17)(A).) In order for a special circumstance to apply in the case of a defendant who, like Moore, did not personally kill the murder victim, the prosecution must prove either that the defendant had the intent to kill (§ 190.2, subd. (c)), or that the defendant “with reckless indifference to human life and as a major participant, aid[ed], abet[ted], counsel[ed], command[ed], induce[d], solicit[ed], request[ed], or assist[ed] in the commission of” a felony such as attempted robbery. (§ 190.2, subd. (d).)

As our Supreme Court noted in *People v. Banks* (2015) 61 Cal.4th 788, 798 (*Banks*), the text of section 190.2, subdivision (d), is derived directly from the United States Supreme Court’s holding in *Tison v. Arizona* (1987) 481 U.S. 137 (*Tison*). Although *Tison* concerned Eighth Amendment restrictions on the imposition of the death penalty, the standards the Supreme Court established in that case “apply equally to cases like this one involving statutory eligibility under section 190.2[, subdivision](d) for life imprisonment without parole.” (*Banks, supra*, 61 Cal.4th at p. 804.)

Tison created two separate tests for imposing the death penalty on an aider and abetter to felony murder. (*Tison, supra*, 481 U.S. at p. 158.) These two tests necessarily overlap (*id.* at p. 158, fn. 12), but they differ in that one focuses on “a special actus reus requirement, major participation in the crime,” while the other involves “a specific mens rea requirement, reckless indifference to human life.”³ (*Banks, supra*, 61 Cal.4th at p. 798.)

³ Because we agree that Moore did not act with reckless indifference to human life, we need not decide whether he met the actus reus requirement, i.e. whether he was a major participant in the attempted robbery in which Childs killed Garcia.

“Reckless indifference to human life ‘requires the defendant be “*subjectively* aware that his or her participation in the felony involved a grave risk of death.” ’ ” (*Banks, supra*, 61 Cal.4th at p. 807.) There is a clear difference between this requirement and that of first degree felony murder liability, in which “ [t]he mental state required is simply the specific intent to commit the underlying felony.’ ” (*Clark, supra*, 63 Cal.4th at p. 615; accord, *Tison, supra*, 481 U.S. at pp. 147–150; *Enmund v. Florida* (1982) 458 U.S. 782, 797 (*Enmund*); *Banks, supra*, 61 Cal.4th at p. 810.) As our Supreme Court explained in *Banks*, “felony murderers like [the defendant in *Enmund, supra*, 458 U.S. 782], who simply had awareness their confederates were armed and armed robberies carried a risk of death, lack the requisite reckless indifference to human life.” (*Banks, supra*, 61 Cal.4th at p. 809.) Or, in other words, “[a]wareness of no more than the foreseeable risk of death inherent in any armed crime is insufficient; only knowingly creating a ‘grave risk of death’ satisfies the constitutional minimum.” (*Id.* at p. 808.)

The Court in *Banks* described a “a continuum, a spectrum of culpability” that a court must consider in determining whether a particular defendant has shown reckless indifference sufficient to justify an LWOP sentence. (*Banks, supra*, 61 Cal.4th at p. 811.) On one end of this continuum lie those who are no more than accomplices in a dangerous crime such as armed robbery. Although they knowingly participate in a crime that carries with it a significant risk of death, this is not sufficient for a finding of a special circumstance. (See *id.* at p. 810.) At the other end are those whose actions demonstrate a higher level of culpability, such as the defendants in *Tison*, who gave “an arsenal of lethal weapons” to two convicted murderers to help them break out of prison, guarded victims at gunpoint, stood by and watched their murder, and left them alone to die in the desert. (*Tison, supra*, 481 U.S. at p. 151.)

In that continuum, this case falls short of the required state of mind.

Our Supreme Court has cited several factors relevant toward placing a defendant along this continuum, including (1) the use and number of weapons, and the defendant's knowledge of them; (2) the defendant's physical presence at the scene of the crime and opportunities to restrain the crime or aid the victim; (3) the duration of the felony; (4) the defendant's knowledge that his cohort was likely to kill; and (5) the defendant's efforts to minimize the risk of the felony. (See *Clark, supra*, 63 Cal.4th at pp. 618-623.) The Court has cautioned that “ ‘[n]o one of these considerations is necessary, nor is any one of them necessarily sufficient.’ ” (*Id.* at p. 618, quoting *Banks, supra*, 61 Cal.4th at p. 803.) Instead, we consider whether these factors support a finding that the defendant displayed “a willingness to kill (or to assist another in killing) to achieve a distinct aim, even if the defendant does not specifically desire that death as the outcome of his actions.” (*Clark, supra*, at p. 617.) The Court in *Clark* further elucidated this standard by noting that “reckless indifference to the value of human life can be ‘every bit as shocking to the moral sense as an “intent to kill” ’ ” (*id.* at p. 616, quoting *Tison, supra*, 481 U.S. at p. 157), and that historically, killings committed with reckless indifference “have incurred equal opprobrium as intentional ones.” (*Clark, supra*, at p. 616.)

C. *Application to this Case*

In this case, there was no evidence that Moore intended to kill Garcia. Accordingly, the prosecution attempted to prove that Moore acted with reckless indifference to human life in aiding and abetting Childs in the attempted robbery in which Childs shot and killed Garcia. (See § 190.2, subd. (d).) Under the standard described above in *Clark, supra*, 63 Cal.4th at pp. 616-617, the

evidence does not support such a finding. Moore's conduct, although undeniably deserving of strong moral opprobrium, did not show a "willingness to kill" and was not as morally shocking as an intentional killing. (*Id.* at p. 617.) All evidence indicated that Childs, not Moore, was the mastermind of the robbery. Childs carried a gun, not Moore. Childs, not Moore, made the decision to shoot Garcia. Moore did not urge Childs to shoot Garcia, did not restrain Garcia, and did not interact in any way with Garcia. Only a single handgun was used in the robbery, and no evidence shows that Moore provided it or even knew that it was loaded. Nor was there any evidence that Moore was aware of Childs' propensity for violence or, indeed that Childs had been violent in the past. (Cf. *id.* at p. 618 ["the high court in *Tison* found significant the fact that [the defendants] 'brought an arsenal of lethal weapons into the Arizona State Prison,' and [one of the defendants] 'guarded the victims at gunpoint while they considered what next to do'"]; *In re Loza* (2017) 10 Cal.App.5th 38, 53 [special circumstance upheld where defendant provided a weapon to the killer, knowing he had a history of violence].) The surveillance video shows that just before the shooting, Moore was standing near the door of the store, several feet away from Childs and a few more feet away from Garcia, with a counter between them. Childs shot at Garcia instantly in response to Garcia's attempt to escape: Moore was barred by the counter, distance and lack of time to prevent the killing. (See *In re Miller* (2017) 14 Cal.App.5th 960, 975 [finding insufficient evidence of a special circumstance in part because the "killing . . . appeared to be somewhat impulsive, much like the shootings in *Banks* and *Clark*; all three shootings occurred when the shooter was unexpectedly confronted"].) Lastly, Moore was still a teenager (age 19) at the time of the murder. There was no evidence that he had the maturity to comprehend fully the dangerousness of Childs's plan.

The Attorney General, however, contends that Moore's presence at the scene when Childs shot Garcia provides enough evidence to justify the finding of a special circumstance requiring a sentence of LWOP. We disagree. Although a defendant's presence at the scene is one of the factors relevant to determining whether he displayed reckless indifference, no single factor is sufficient. (*Clark, supra*, 63 Cal.4th at p. 618.) The Court in *Clark* stressed that the defendant's presence is particularly relevant in cases in which "the murder is a culmination or a foreseeable result of several intermediate steps, or where the participant who personally commits the murder exhibits behavior tending to suggest a willingness to use lethal force." (*Id.* at p. 619.) This was not such a case. The surveillance video shows that Childs resorted to shooting Garcia almost instantaneously when Garcia turned to flee, and there was no evidence that Moore knew that Childs was likely to use lethal force. Indeed, Moore had completed several prior robberies with Childs in which Childs did not fire the gun. Because the killing happened so suddenly, Moore's presence did not " 'give[] him an opportunity to act as a restraining influence on [a] murderous cohort[].' " (*Ibid.*)

The Attorney General also notes that Moore did not take any steps to prevent the killing or minimize the risk of the robbery but does not describe what, short of preventing Moore from carrying a gun, those steps might have been. But the awareness that a confederate will be armed during a robbery is insufficient to show reckless indifference to human life. (*Banks, supra*, 61 Cal.4th at p. 809.) Thus, Moore's failure to prevent Childs from carrying a weapon by itself cannot justify an LWOP sentence.

In summary, all the facts must be considered to justify an LWOP sentence. Indeed, in *Clark* where the defendant was, unlike Moore, the mastermind of the robbery, the high court held even that high degree of participation was insufficient to support a

special-circumstance finding. (*Clark, supra*, 63 Cal.4th at pp. 621-623.) The defendant in *Clark* set in motion a scheme to rob the CompUSA store just after closing time, holding the employees at gunpoint and handcuffing them in the store's restroom, and then driving off with the store's merchandise in a U-Haul truck. (*Id.* at pp. 536-537.) The plan went wrong when the mother of one of the employees entered the store unexpectedly, and the defendant's accomplice shot her. (*Id.* at p. 539.)

According to the Court in *Banks*, "only roughly 1 in 200 [armed robberies] results in death." (*Banks, supra*, 61 Cal.4th at p. 811, citing *Enmund, supra*, 458 U.S. at p. 800, fn. 24.) Any action that carries with it a 1 in 200 risk of death is extraordinarily dangerous. For this reason, a defendant such as Moore may be guilty of first degree murder simply for participating in a robbery in which a victim dies, even if the defendant took no part in the killing himself. But even conduct this dangerous is not sufficient to show that a defendant acted with reckless indifference to human life. (See *Clark, supra*, 63 Cal.4th at p. 623.) As the Court explained in *Clark*, reckless indifference "encompasses a willingness to kill (or to assist another in killing) to achieve a distinct aim, even if the defendant does not specifically desire that death as the outcome of his actions." (*Id.* at p. 617.) The evidence in this case does not support an inference that Moore displayed the degree of complicity that allows an LWOP sentence.

In determining where on the "continuum" described in *Banks* the facts here lie, we recognize *Banks* and *Clark* do not involve a participant in multiple, and somewhat similar, prior commercial armed robberies. But this factual difference does not permit us to conflate the difference between the mens rea required for felony-murder with the mens rea required for the special circumstance finding and LWOP sentence. Nor does it permit us to ignore Supreme Court precedent holding that the mere presence of

a gun at a robbery is insufficient to support the mens rea requirement for the LWOP enhancement. Consequently, although there was ample evidence to support Moore's first degree murder conviction, the evidence to support a special-circumstance finding was insufficient.

II. SUFFICIENCY OF THE EVIDENCE OF FALSE IMPRISONMENT ON DECEMBER 23

Childs and Moore each contend that there was insufficient evidence to support their convictions for felony false imprisonment of Rudy J. in the course of an armed robbery of a Yoshinoya restaurant they committed on December 23, 2013. They argue that the evidence does not support an inference that they acted with violence, menace, fraud, or deceit, as is required to elevate false imprisonment from a misdemeanor to a felony. (See § 237, subd. (a).) We disagree.

A. *Relevant Facts*

At around 10:40 p.m. on December 23, 2013, Childs and Moore entered a Yoshinoya restaurant in Gardena. Luz N. was working as cashier, and Rudy J. was the cook. Childs and Moore placed an order, and when Luz N. opened the cash register, Childs jumped over the counter, pointed a gun at her, and said, "Give me the money."

Childs took \$100 from the register and told Luz N. to open a black box underneath the register. Luz N. opened the box, and Childs pulled out the papers inside it. Childs then told Luz N. to walk back toward the restaurant's office, which was adjacent to the kitchen.

While this was happening, Moore went to the kitchen and stood beside Rudy J. As Childs walked past the kitchen on the way to the office, he showed Rudy J. his gun and told him to stay still

and not to turn to look at the robbers. Rudy J. stayed in the far end of the kitchen facing the wall for the duration of the robbery.

Once Luz N. and Childs entered the restaurant's office, Childs told Luz N. to open the three safes that were located in it. Luz N. opened one of them, and Childs took the money inside it, at which point Childs and Moore left the restaurant.

B. *Analysis*

Section 236 defines false imprisonment as “the unlawful violation of the personal liberty of another.” (§ 236.) The offense is a felony if “effected by violence, menace, fraud, or deceit.” (§ 237, subd. (a).) Otherwise, it is a misdemeanor. (See *ibid.*) In this case, the prosecution argued that Childs's and Moore's actions constituted felony false imprisonment on the ground that they acted with menace in violating Rudy J.'s personal liberty. For purposes of felony false imprisonment, “[m]enace means a threat of harm express or implied by wor[d] or act.” (*People v. Hendrix* (1992) 8 Cal.App.4th 1458, 1462, quoting CALJIC No. 9.60.) We review for substantial evidence under the same standard described above. (See Discussion part I.B, *ante.*)

Childs contends that “to constitute menace sufficient to sustain a felony false imprisonment conviction, the threats must be accompanied by some physical touching.” The case Childs cites for this proposition is *People v. Aispuro* (2007) 157 Cal.App.4th 1509 (*Aispuro*), which does not support his argument. The court in *Aispuro* held that “[a]n express or implied threat of harm does not require the use of a deadly weapon or an express verbal threat to do additional harm. Threats can be exhibited in a myriad number of ways, verbally and by conduct.” (*Id.* at p. 1513.) Although the court noted that the defendant “had his hand on one of the [victims'] hoods at the time” (*ibid.*), nothing about the court's opinion suggests that this touching was required to establish menace. Indeed,

the court explicitly stated that a defendant might threaten a victim “even though he did not raise his fist or display a deadly weapon.” (*Ibid.*) Childs cites several cases in which a court held that a defendant who acted violently were guilty of felony false imprisonment. (E.g., *People v. Castro* (2006) 138 Cal.App.4th 137, 143; *People v. Reed* (2000) 78 Cal.App.4th 274, 281; *People v. Williams* (2017) 7 Cal.App.5th 644, 674.) But these cases do not hold that violence or the use of a weapon is *required* for felony false imprisonment, only that it is sufficient.

Instead, all that is required to show menace for felony false imprisonment is that the defendant made a “‘*verbal* or physical threat of harm. The threat of harm may be express or implied.’” (*Aispuro, supra*, 157 Cal.App.4th at p. 1512, quoting CALCRIM No. 1240, italics added.) In this case, there was sufficient evidence to support the convictions of Childs and Moore. Rudy J. testified that when the robbery began, Moore stood beside him, effectively confining him to the corner of the kitchen. Although neither Childs nor Moore apparently touched Rudy J., Childs showed Rudy J. his gun and told him to stay still and not to look at Childs and Moore. A reasonable jury could interpret this as an implied threat of violence against Rudy J. and conclude that the false imprisonment was accomplished by means of menace.

III. SUFFICIENCY OF THE EVIDENCE OF THE FIREARM ENHANCEMENT IN DECEMBER 24 ROBBERY

Childs contends that there was insufficient evidence to support the jury’s finding pursuant to section 12022.53, subdivision (b), that Childs personally used a firearm in committing an armed robbery on December 24, 2013. He notes that the only witness to testify regarding the robbery claimed that Moore, rather than Childs, was the gunman. We are not persuaded.

A. Relevant Facts

Jessica L. testified that on December 24, 2013, at around 11.30 p.m., while she was working at a USA gas station in Carson, two men entered. One of the men, who was armed with a gun, jumped over the counter and demanded that Jessica L. open the cash register. The other man, who Jessica L. described as “instigating the whole thing,” told Jessica L. to open the second cash register, and when she opened one of the registers, he came around the counter and grabbed the money out of it.

The gunman demanded that Jessica L. open a box underneath the register. Jessica L. explained that the box was not a safe, and the gunman said, “Let’s go to the back.” The three walked to a room in the back of the store. Jessica L. claimed that she could not open the safe, and the two robbers decided to leave.

About one week after the robbery, police officers showed Jessica L. several photos and asked her if any of them were the robbers. Jessica L. selected two photographs from a six-pack lineup that she believed depicted the “instigator.” One of those photos was of Moore. At trial, Jessica L. identified Moore and Childs as the robbers. She testified that Moore was the gunman and Childs the “instigator,” who stayed behind the counter, but she admitted she was not certain which one was which.

The prosecution showed video clips of the robbery to the jury, including screenshots showing the two robbers. The videos depict two men, one who is taller and wears a dark hoodie with red gloves, and another who is shorter and wears a dark hoodie with a lighter pattern on the inside. The taller man leaps over the counter with a gun in his hand and confronts the cashier, while the shorter man stands behind the counter. The cashier opens the register, and the smaller man walks around to the other side. Both men then take

money out of the register. One of the videos briefly shows the robbers' faces.

B. Analysis

Section 12022.53, subdivision (b), provides for a 10-year sentence enhancement for anyone who “personally uses a firearm” in the commission of certain offenses, including robbery. Childs contends that there was insufficient evidence to establish that he, rather than Moore, was the gunman. We review the jury’s finding for substantial evidence (see Discussion, part I.B, *ante*, for a discussion of the substantial evidence standard), and we disagree.

Childs analogizes this case to *People v. Pearson* (2012) 53 Cal.4th 306, in which three men sexually assaulted a woman and beat her to death. The defendant admitted to police that he took part in the attack, but stated that only his accomplices used a stick or stake in the crime. (*Id.* at p. 318.) No physical evidence existed to contradict his account. (*Id.* at p. 319.) Our Supreme Court held that there was insufficient evidence to show that the defendant personally used a weapon. (*Id.* at pp. 318-319.)

In this case, there is significantly more evidence tying Childs to the use of the handgun. Although Jessica L. was not sure which of the two robbers carried the weapon, the video surveillance footage provided additional information. It showed that the gunman was several inches taller than his accomplice. Childs is approximately five inches taller than Moore. Furthermore, the man in the video who did not carry a gun wore a black hoodie with a light-colored pattern on the inside. This was the same pattern hoodie that Moore wore during other robberies. In addition, the jury could draw inferences regarding the robbery of Jessica L. from the evidence of several other robberies that Childs and Moore committed together in the days before and after the robbery. In almost all of those robberies, Childs and Moore followed the same

pattern: Childs carried a gun and climbed or leaped over the counter toward the cashier while Moore remained on the other side. A reasonable jury could conclude that the defendants followed the same plan in the robbery of Jessica L., and that Childs, rather than Moore, used the gun.

This evidence together was sufficient to support the jury's finding regarding the enhancement under section 12022.53, subdivision (b).

IV. SUFFICIENCY OF THE EVIDENCE OF THE ROBBERY ON DECEMBER 25

Childs and Moore contend that there was insufficient evidence that they committed a robbery at a gas station on December 25, 2013. They note that the victims could not identify either of them as the assailants at trial, and that the surveillance video footage introduced at trial does not show their faces. We disagree.

A. *Relevant Facts*

At around 4:30 p.m. on December 25, 2013, M.P. was working as a cashier at a Mobil gas station in Carson. Two men entered the store. They were both taller than M.P., who is 5 feet 3 inches tall, and they were wearing hoodies. One hoodie was dark colored, while the other had a black and white camouflage pattern. M.P. could not see their faces and could not recognize them at trial.

The man wearing a dark hoodie, who was holding a gun, jumped over the counter. The other man, in the printed hoodie, walked around the counter. The gunman took a plastic bag from the counter and told her to open the register and “[g]ive me the money in my hand.” M.P. complied, putting the money from the register in the plastic bag. The store manager, O.M., then came out of the restroom. The gunman went to O.M. and brought him behind the counter. The robbers demanded the key to the store’s safe, but

M.P. and O.M. denied that they had it. A customer then entered the store, and the two robbers left.

The prosecution played video surveillance footage of the robbery, which corroborated M.P.'s account. Although the robbers generally faced away from the camera, their faces were sometimes visible, and it was possible to see their full attire, including the shoes they were wearing.

B. *Analysis*

Childs and Moore contend that there was insufficient evidence to support the jury's finding that they were the robbers. We disagree. Despite M.P.'s inability to identify the robbers, the surveillance video footage and the distinctive method the robbers used were sufficient to link Childs and Moore to the crime for purposes of the deferential substantial evidence standard of review. (See Discussion part I.B, *ante*.)

The similarity of the December 25 robbery to previous robberies Childs and Moore had committed over the previous two weeks provided evidence that Childs and Moore were the perpetrators of the December 25 robbery as well. (See Evid. Code, § 1101, subd. (b) [allowing evidence of other crimes to prove the identity of a defendant in a charged offense].) By the time of the December 25 robbery, Childs and Moore had committed nine robberies or attempted robberies in six separate incidents within the previous six days. Neither Childs nor Moore challenges the sufficiency of the evidence linking them to any of these crimes, and the jury concluded that Childs and Moore were guilty of all of them beyond a reasonable doubt. All but one of the robberies were of convenience stores or gas stations. In every case, Childs and Moore entered the store together wearing hoodies that partially obscured their faces. In every case, Childs pulled a gun out of his pocket and jumped over the counter, where he demanded that the

cashier open the register and give him the money. The jury could draw a reasonable inference that Childs and Moore were the perpetrators of the December 25 robbery as well.

In addition, the surveillance video provided direct evidence to allow the jury to identify Childs and Moore as the robbers. The video footage showed portions of the robbers' faces and the way they moved, and also the way they were dressed. In particular, the video showed the gunman wearing gray Nike shoes with a white swoosh logo outlined in lime green, similar to the shoes Childs was wearing at the time police arrested him. The hoodie that the other robber wore, with a black-and-white camouflage pattern, was similar to the interior pattern of the hoodie Moore wore while participating in other robberies, including one the night before, in which the jury viewed surveillance footage of Moore wearing the hoodie. A reasonable jury could infer that the same robber was involved in the December 25 video, and was wearing the same hoodie inside-out.

V. RESENTENCING PURSUANT TO SENATE BILL NO. 620

In October 2017, the Legislature enacted Senate Bill No. 620. The bill amended section 12022.5 and section 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), 12022.53, subd. (h).) Prior to 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, citing former § 12022.53, subd. (h).)

The trial court imposed 16 section 12022.53 enhancements in sentencing Childs, and three such enhancements in sentencing Carter. Although the court imposed these sentences prior to the January 1, 2018 effective date of Senate Bill No. 620, both Childs and Carter contend that the law applies retroactively, and that they are entitled to resentencing. We agree.

Although the general rule is that the Penal Code does not apply retroactively (see § 3), an exception applies in cases in which the Legislature has amended the code to reduce the punishment for a specific offense. (*People v. Brown* (2012) 54 Cal.4th 314, 323 (*Brown*), fn. omitted, citing *In re Estrada* (1965) 63 Cal.2d 740, 742-748.) In such cases, “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.” (*Brown, supra*, 54 Cal.4th at p. 323.) The Supreme Court has extended the *Estrada* holding to amendments that do not *necessarily* reduce a defendant’s punishment, but which give the trial court discretion to impose a lesser sentence. (*People v. Francis* (1969) 71 Cal.2d 66, 75-76; see also *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 301.) Childs and Carter contend that under this case law, Senate Bill No. 620 applies retroactively to defendants in their position. The People concede that Childs and Carter are correct, and we agree.

Nevertheless, the People argue that we need not remand Childs’s and Carter’s cases for resentencing on the ground that, upon remand, the court would not exercise its discretion to reduce their sentences.⁴ The People cite *People v. Gutierrez* (1996)

⁴ The People also contend in a letter brief filed in December 2017, that we should deny Childs’s and Carter’s requests for relief as unripe, noting that Sen. Bill No. 620 did not become effective until January 1, 2018. But we issue our opinion in this case after January 1, 2018, and the issue is therefore ripe for our decision.

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 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. It stated that imposing the maximum sentence was appropriate. It increased appellant's sentence beyond what it believed was required by the three strikes law, by imposing the high term . . . and by imposing two additional discretionary one-year enhancements. Under the circumstances, no purpose would be served in remanding for reconsideration." (*Gutierrez, supra*, 48 Cal.App.4th at p. 1896.)

The People argue that, by the same reasoning, there is no need to remand Childs's and Carter's cases. They point out that the court found that "[t]he nature, seriousness, and circumstances of this case [were] substantially more aggravated than other robbery cases," and that the court chose the high term and consecutive sentences when possible in sentencing Childs. Similarly, the court declined to strike Carter's prior strike conviction and elected to sentence Carter to consecutive rather than concurrent sentences.

We are not persuaded. In *Gutierrez*, the trial court stated during the initial sentencing hearing that " 'this is the kind of individual the law was intended to keep off the street as long as possible,' " and indicated that it would not have exercised its discretion to lessen the sentence. (*Gutierrez, supra*, 48 Cal.App.4th at p. 1896.) In the current case, although the trial court imposed longer prison terms where possible, the court did not state or imply that it would have imposed all of the firearm enhancements even if it had the discretion not to do so.

Furthermore, because the law at the time of sentencing did not allow the trial court to strike firearm enhancements, Childs and Carter did not have a reason to argue that the court should strike them. As our Supreme Court explained in a somewhat similar circumstance in *People v. Rodriguez* (1998) 17 Cal.4th 253, superseded by statute on other grounds, as stated in *People v. James* (2001) 91 Cal.App.4th 1147, 1149, “[t]he evidence and arguments that might be presented on remand cannot justly be considered ‘superfluous,’ because defendant and his counsel have never enjoyed a full and fair opportunity to marshal and present the case supporting a favorable exercise of discretion.” (*Id.* at p. 258 [requiring the presence of defendant and counsel at a hearing in which the court would determine whether it could reasonably exercise its discretion to strike a prior strike].)

VI. CORRECTING CREDITS AND ABSTRACTS OF JUDGMENT

Childs and Moore request that we correct various errors in their abstracts of judgment and in the calculation of Childs’s credit for time served prior to his conviction. The People concede that these are errors, and we agree. Accordingly, we will order Childs’s and Moore’s abstracts of judgment corrected.

At the time of sentencing, the trial court awarded Childs 913 days of credit for time served. The record shows that Childs was arrested on January 2, 2014, and remained in custody until he was sentenced on July 6, 2016. By our calculation, this means that Childs was incarcerated for 917 days prior to sentencing, including both the date of his arrest and the date of sentencing.⁵ In a case in

⁵ Our calculation of the number of elapsed days includes the leap day, February 29, 2016. Childs contends that he spent 918 days in custody prior to sentencing, but this appears to be a miscalculation.

which a defendant raises other issues on appeal, we may resolve issues regarding custody credits without remanding the question to the trial court. (*People v. Jones* (2000) 82 Cal.App.4th 485, 493.) Therefore, we will modify Childs's judgment to reflect 917 custody credits.

At Childs's sentencing, the trial court stated that it was imposing an additional term of one-third of one year, or four months, for the firearm enhancement (§ 12022, subdivision (a)(1)) in count 26. The abstract of judgment, however, states that Childs received a sentence of one year for this enhancement. We may correct clerical errors in the abstract of judgment on our own motion or upon application of the parties. (*People v. Jones* (2012) 54 Cal.4th 1, 89.) We therefore order that the abstract of judgment be corrected to reflect the sentence the trial court imposed, which was a four-month enhancement on count 26, and 31 years of enhancements on the attachment page of the abstract of judgment. The abstract of judgment correctly listed an aggregate determinate sentence of 79 years 8 months for Childs, and this figure does not need to be corrected.

When sentencing Moore, the trial court imposed a four-month enhancement pursuant to section 12022, subdivision (a)(1) on count 4. The abstract of judgment shows a sentence of one year for this enhancement, and indicates that it was imposed pursuant to section 12044, subdivision (a)(1). The Penal Code does not contain a section 12044. On the same basis we described in the preceding paragraph, we order that the abstract of judgment be corrected to reflect a four-month sentence for the enhancement in count 4, pursuant to section 12022, subdivision (a)(1).

DISPOSITION

The trial court's judgment is reversed with respect to the finding of a special circumstance on Moore in count 1. The abstracts of judgment for Childs and Moore, along with the calculation of Childs's presentence credits shall be corrected as we have described above, in part VI of the Discussion. The case is remanded for resentencing of Childs and Carter regarding the handgun enhancements, and for Moore with respect to count 1. In all other regards, the judgment of the trial court is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, J.*

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