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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES HILL et al.,

Defendants and Appellants.

B254830

(Los Angeles County
Super. Ct. No. KA100121)

APPEALS from judgments of the Superior Court of Los Angeles County,
David C. Brougham, Judge. Affirmed in part and reversed in part with directions.

George W. Taylor, under appointment by the Court of Appeal, for
Defendant and Appellant Charles Hill.

William L. Heyman, under appointment by the Court of Appeal, for
Defendant and Appellant Deveon Keaton.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant
Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stephanie A.
Miyoshi and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Charles Hill and Deveon Keaton of two counts each of second degree robbery (Pen. Code, § 211)¹ (counts 2 & 3) and two counts each of assault with a firearm (§ 245, subd. (a)(2)) (counts 4 through 7) in connection with a robbery that occurred on November 5, 2012. The jury found true the allegations that in the commission of the robbery a principal was armed with a firearm (§ 12022, subd. (a)(1)), Keaton personally used a firearm (§ 12022.53, subd. (b)), Keaton personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), Keaton personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)), and Keaton personally inflicted great bodily injury on a person other than an accomplice (§ 12022.7, subd. (a)). The trial court found that Keaton had suffered a prior conviction that qualified as a strike under the three strikes law (§§ 667, subds. (b)-(i)), 1170.12, subds. (a)-(d)), had been convicted of a serious felony (§ 667, subd. (a)(1)), and had served a prior prison term (§ 667.5, subd. (b)).

The jury also convicted Hill of another count of second degree robbery (count 1) in connection with a robbery that occurred on October 23, 2012. The jury found true the allegation that in the commission of that robbery Hill personally used a firearm (§ 12022.53, subd. (b)). The trial court found that Hill had suffered a prior conviction that qualified as a strike (§§ 667, subds. (b)-(i)), 1170.12, subds. (a)-(d)), had been convicted of a serious felony (§ 667, subd. (a)(1)), and had served a prior prison term (§ 667.5, subd. (b)).

This appeal involves the sentences the trial court imposed on the two defendants.

The trial court sentenced Keaton to a prison term of five years on count 2, doubled to 10 years under the three strikes law, plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d), five years for the prior serious felony, and

¹ All statutory references are to the Penal Code.

one year for the prior prison term. The court also sentenced Keaton to a consecutive prison term of two years on count 3, plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d). The court struck the great bodily injury enhancement (§ 12022.7, subd. (a)) and stayed punishment on the remaining counts. Keaton's aggregate prison term is 68 years to life.

Keaton does not challenge his convictions or the true findings on the special allegations. Keaton contends (1) the trial court was unaware of its discretion to impose a concurrent prison term on count 3; (2) if the court was aware of its discretion, the court abused its discretion by imposing an aggregate sentence of 68 years to life; (3) the court erred by failing to state its reasons for imposing a consecutive sentence on count 3; (4) his aggregate sentence is grossly excessive and constitutes cruel and unusual punishment under the federal and state constitutions; (5) section 12022.53, subdivision (d), imposes a grossly excessive punishment and is unconstitutional on its face; and (6) if Keaton forfeited any of these arguments by failing to object in the trial court, his trial counsel rendered ineffective assistance.

The trial court sentenced Hill to a prison term of five years on count 1, doubled to 10 years under the three strikes law, plus 10 years for the firearm enhancement under section 12022.53, subdivision (b), plus five years for the prior serious felony. The court also sentenced Hill to a consecutive prison term of one year on each of counts 2 and 3, doubled to two years each under the three strikes law, plus an additional four months on each count for the firearm enhancement under section 12022, subdivision (a)(1). Hill's aggregate prison term is 29 years, eight months.

Appellate counsel for Hill filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 summarizing the trial court proceedings and the facts of the case. Counsel did not present any argument for reversal or modification of the judgment, but asked this court to conduct an independent review of the record for any arguable issues. Counsel also identified a single issue "to assist the court in conducting its independent review of the record": whether the trial court erred by failing to exercise its discretion in deciding to impose a consecutive sentence for count 3. On July 29, 2014 we notified Hill

that he could submit a supplemental brief raising any contentions or issues he wanted us to consider, but we did not receive a response. On October 9, 2015 we notified appellate counsel for Hill that the issue identified in his opening brief was arguable. We requested and received a supplemental brief on the issues of the trial court's failure to state reasons for imposing a consecutive sentence on count 3, forfeiture of the argument, ineffective assistance of counsel, and the appropriate remedy for any sentencing error. We also received a supplemental brief from the People.

We conclude that the trial court erroneously believed that the law required a consecutive sentence on count 3 for both defendants and that the court failed to exercise its discretion to impose either a concurrent or a consecutive sentence. We conclude that both defendants are entitled to resentencing on count 3.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Crimes*

On October 23, 2012 Hill and an accomplice entered the Smoke Shop in Pomona. Arshad Mahmood was working as a cashier. Hill asked Mahmood for a pack of cigarettes and handed him a \$5 bill. When Mahmood opened the cash register, Hill pulled out a gun, pointed it at Mahmood, and told him not to move. Hill and his accomplice then jumped over the counter, and Hill physically forced Mahmood to the floor. Hill took \$460 in cash and a driver's license from Mahmood's pockets, while Hill's accomplice took money from the cash register. The two men fled.

On November 5, 2012 Keaton and Hill entered a convenience market at a gas station in Pomona. Abel Quintero was working as a cashier. The gas station owner, Samuel Aghazarian, was working in an office on the second floor above the market. Keaton pulled out a gun, pointed it at Quintero, and told Quintero to hand over all the money or he would kill him. Keaton jumped over the counter and held the gun against the back of Quintero's shoulder. Quintero opened the cash register, and Keaton grabbed

money from the register. Meanwhile, Hill had walked behind the counter through a hinged door. Quintero felt Hill poking his back with something that felt like a knife.

Video monitors in the upstairs office showed live images from surveillance cameras in the market. On a monitor Aghazarian saw Keaton jump over the counter. Aghazarian grabbed his gun and went downstairs. As he descended the stairs he saw Hill and fired a warning shot to the floor. Hill ran out of the store. Keaton, who was still behind the counter, then fired repeatedly at Aghazarian, and Aghazarian fired back. Bullets struck Aghazarian's right arm and grazed his arm, leg, and head. Aghazarian could not raise his right arm to shoot, and he fell to the floor. Keaton dropped the money and ran out of the store. As he fled, Keaton fired a shot toward Quintero, but it did not hit him.

B. *The Trial and Sentencing*

Mahmood, Aghazarian, and Quintero testified at trial. Mahmood identified Hill as one of the assailants in the October 23, 2012 robbery. Aghazarian and Quintero identified Hill and Keaton as the assailants in the November 5, 2012 robbery.

The jury found Hill and Keaton guilty on several counts, and the jury and trial court found true the special allegations. In her sentencing memoranda the prosecutor argued that the defendants had acted with disregard for human life and showed no remorse, and that there was no reason not to impose consecutive sentences. Citing *People v. Deloza* (1998) 18 Cal.4th 585 (*Deloza*), counsel for Keaton argued in her sentencing memorandum that the trial court had the discretion to and should impose concurrent, rather than consecutive, sentences on counts 2 and 3 because Keaton committed the gas station market crimes on the same occasion and those crimes arose from the same set of operative facts. Counsel for Hill argued against imposing the maximum term in her sentencing memorandum, but she did not address the issue of consecutive sentences.

At the sentencing hearing the trial court stated its reasons for selecting the upper term on count 1 against Hill, doubled the term pursuant to the three strikes law, and added the enhancements.² The court then stated regarding the subordinate term on count 2 against Hill, “the strike conviction mandates that the sentence run consecutive.” The court stated regarding the subordinate term on count 3 against Hill, “And again, on count 3, the same situation. The strike prior mandates that an extra two years and four months run concurrent.” When the prosecutor asked whether the court meant “consecutive,” the court acknowledged that it had misspoken and stated, “The strike prior mandates that all current felony—all current violent and serious felonies run consecutive.” The court then asked whether counsel had anything further to say regarding Hill, and counsel for Hill answered “no.”

The trial court also stated its reasons for selecting the upper term on count 2 against Keaton, doubled the term pursuant to the three strikes law, and added the enhancements, resulting in a principal term of 41 years to life.³ The court then computed one-third of the middle term on count 3 and stated that the resulting two-year base term on count 3 “is given . . . consecutively.” The court added an enhancement of 25 years to life on count 3 pursuant to section 12022.53, subdivision (d), and stated that the law required the enhancement to be consecutive to the principal term plus the subordinate base term. The court added other enhancements and concluded, “[t]herefore, the total sentence is 68 years to life as required by law.”

² The trial court must state orally on the record its reasons for selecting either the upper, middle, or lower term. (Cal. Rules of Court, rule 4.420(e).) The trial court identified three aggravating circumstances in selecting the upper term of five years on count 1 against Hill: (1) Hill’s violent conduct was a danger to society, (2) his prior convictions were of increasing seriousness, and (3) he had served a prior prison term. All references to rules are to the California Rules of Court.

³ The trial court identified three aggravating circumstances in selecting the upper term of five years on count 2 against Keaton: (1) Keaton’s violent conduct was a danger to society, (2) his prior convictions were of increasing seriousness, and (3) he had served a prior prison term.

DISCUSSION

A. *The Trial Court Failed To Exercise Sentencing Discretion in Imposing Consecutive Terms*

Keaton and Hill contend the trial court erroneously concluded that the law required a consecutive term on count 3 and that the court had no discretion to impose a concurrent term. The record affirmatively reflects that the trial court did commit this sentencing error.

Section 667, subdivision (c), provides, “Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior serious and/or violent felony convictions as defined in subdivision (d), the court shall adhere to each of the following,” including subdivision (c)(6) and (7).⁴ Section 667, subdivision (c)(6), states, “If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e).” Subdivision (c)(6) applies to any current felony conviction. (*People v. Hendrix* (1997) 16 Cal.4th 508, 512 (*Hendrix*); *People v. Sullivan* (2007) 151 Cal.App.4th 524, 568, fn. 18 (*Sullivan*).) Thus, when a defendant with a prior qualifying conviction is convicted of one or more current felonies “not committed on the same occasion, and not arising from the same set of operative facts” (§ 667, subd. (c)(6)), the court must impose the sentences for the current felonies consecutive to each other. (*People v. Casper* (2004) 33 Cal.4th 38, 42 (*Casper*); *Hendrix, supra*, at pp. 512-513; *Sullivan, supra*, at p. 568, fn. 18.)

⁴ Proposition 36, approved by the electorate on November 6, 2012, added the words “serious and/or violent” before “felony convictions.” (Prop. 36, § 2, as approved by voters, Gen. Elec. (Nov. 6, 2012).)

The language of section 667, subdivision (c)(6), implies that consecutive sentences for the current felonies are not mandatory under subdivision (c)(6) if the defendant committed the current felonies on the same occasion or if the felonies arose from the same set of operative facts. (*Hendrix, supra*, 16 Cal.4th at pp. 512-513; *People v. Byrd* (2011) 194 Cal.App.4th 88, 104 (*Byrd*); see *People v. Hojnowski* (2014) 228 Cal.App.4th 794, 800 (*Hojnowski*) [the California “Supreme Court has construed this language to mean “‘consecutive sentences are not mandatory [under the Three Strikes law] if the multiple current felony convictions are ‘committed on the same occasion’ or ‘aris[e] from the same set of operative facts’””].)

Section 667, subdivision (c)(7), states, “If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.” Subdivision (c)(7) applies only if the defendant suffers more than one current conviction of a serious or violent felony.⁵ (*Hendrix, supra*, 16 Cal.4th at p. 513; see *People v. Lawrence* (2000) 24 Cal.4th 219, 223, fn. 2 (*Lawrence*).) Because the reference to “paragraph (6)” refers to subdivision (c)(6), the language “current conviction for more than one serious or violent felony as described in paragraph (6)” means current serious or violent felonies that were not committed on the same occasion and did not arise from the same set of operative facts. (*Hendrix, supra*, at p. 513.) Pursuant to subdivision (c)(7), “when a defendant is convicted of two or more current serious or violent felonies ‘not committed on the same occasion, and not arising from the same set of operative facts,’ not only must the court impose the sentences for these serious and violent felonies consecutive to each other, it must also impose these sentences ‘consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.’” (*Hendrix, supra*, at p. 513 [quoting

⁵ Robbery is both a violent felony and a serious felony as defined in sections 667.5, subdivision (c), and 1192.7, subdivision (c).

section 667, subdivision (c)(6) and (7), respectively].) The language of this provision also implies that consecutive sentences are not mandatory under subdivision (c)(7) if the current serious or violent felonies were committed on the same occasion or arose from the same set of operative facts. (See *Casper, supra*, 33 Cal.4th at p. 42; *Hendrix, supra*, at p. 513; *Byrd, supra*, 194 Cal.App.4th at p. 104.)

The trial court has discretion to impose either concurrent or consecutive sentences for multiple current felonies if neither section 667, subdivision (c), section 1170.12, subdivision (a), nor any other statutory provision mandates consecutive sentences.⁶ (*Hendrix, supra*, 16 Cal.4th at p. 514; see *Casper, supra*, 33 Cal.4th at p. 42; *Byrd, supra*, 194 Cal.App.4th at p. 104; see also § 669, subd. (a).) A court exercising such discretion must state on the record its reasons for imposing either concurrent or consecutive sentences. (§ 1170, subd. (c); rule 4.406(b)(5); *People v. Powell* (2011) 194 Cal.App.4th 1268, 1297.)

“The phrase ‘committed on the same occasion’ is commonly understood to refer to at least a close temporal and spatial proximity between two events, although it may involve other factors as well.” (*Deloza, supra*, 18 Cal.4th at p. 594; accord, *Hojnowski, supra*, 228 Cal.App.4th at p. 800, fn. 8.) *Deloza* involved armed robberies committed against multiple victims in a furniture store. (*Deloza, supra*, at p. 589.) The Supreme Court stated, “Given the close temporal and spatial proximity of defendant’s crimes against the same group of victims, they were clearly committed on the ‘same occasion,’

⁶ Section 1170.12, subdivision (a), (a)(6) and (7), were virtually identical to section 667, subdivision (c), (c)(6) and (7), at the time Keaton and Hill committed the crimes in this case. Proposition 36 amended sections 667 and 1170.12 effective as of November 7, 2012. (Prop. 36, *supra*, § 10.) The versions of the statutes in effect on the date of the crimes govern here. We need not decide whether section 1170.12, subdivision (a)(7), as amended by Proposition 36 would prescribe mandatory consecutive sentences in these circumstances because to apply such a requirement in this case would violate the ex post facto clause. (See *People v. Delgado* (2006) 140 Cal.App.4th 1157, 1167 [“the removal of a sentencing court’s discretion can, indeed, implicate the ex post facto clause”].)

regardless of what additional factors may be found relevant in defining the precise parameters of this phrase in future cases.” (*Id.* at p. 596.)

Similarly here, the close temporal and spatial proximity of defendants’ crimes in the gas station market compels the conclusion that defendants committed those robberies on the same occasion within the meaning of sections 667, subdivision (c)(6) and (7), and 1170.12, subdivision (a)(6) and (7).⁷ Because they committed the two robberies on the same occasion, sections 667, subdivision (c)(6) and (7), and 1170.12, subdivision (a)(6) and (7), did not require consecutive sentences.⁸ (See *People v. Bell* (1998) 61 Cal.App.4th 282, 294 [trial court had discretion under section 667, subdivision (c)(6) and (7), to impose concurrent sentences where the “robbery and attempted robbery were simultaneously perpetrated by two attackers acting in concert”].) Absent any other statute requiring a consecutive sentence, the trial court retained discretion to impose either a concurrent or a consecutive sentence on count 3.⁹

The record affirmatively shows that the trial court erroneously believed it did not have this discretion, and mistakenly concluded that the law required a consecutive sentence on count 3 for both defendants. The court stated regarding the sentence on count 2 against Hill, “the strike conviction mandates that the sentence run consecutive.” The court also stated, “And again, on count 3, the same situation. The strike prior mandates that an extra two years and four months run concurrent.” The court later

⁷ In contrast, the Smoke Shop robbery occurred on a different occasion from the gas station market robberies and arose from a different set of operative facts. The trial court therefore correctly determined that Hill’s sentences on counts 2 and 3 must be consecutive to his sentence on count 1. (§§ 667, subd. (c)(6) & (c)(7), 1170.12, subd. (a)(6) & (a)(7); see *Lawrence*, *supra*, 24 Cal.4th at p. 234; *Byrd*, *supra*, 194 Cal.App.4th at pp. 104-105.)

⁸ Because we conclude that defendants committed the gas station market robberies on the same occasion, we need not decide whether those robberies also arose from the same set of operative facts. (See *Deloza*, *supra*, 18 Cal.4th at p. 596, fn. 7.)

⁹ The People do not contend any other statute required consecutive sentences.

clarified that it intended to say “consecutive” rather than “concurrent,” and stated, “The strike prior mandates that all current felony – all current violent and serious felonies run consecutive.” Thus, the trial court concluded that the fact that Hill had suffered a prior strike for a serious felony required a consecutive sentence on count 3.

The court applied the same erroneous reasoning to count 3 against Keaton, stating without further explanation that the subordinate term for count 3 was consecutive to the principal term. The court said nothing to suggest it was making a finding that Keaton and Hill did not commit the crimes in the market on the same occasion or that those crimes did not arise from the same set of operative facts, and the record would not support such a finding. The court’s failure to discuss any of the criteria under rule 4.425, which sets forth the non-exclusive (rule 4.408(a)) criteria the court should consider in deciding whether to impose consecutive or concurrent sentences, also shows that the court misunderstood and failed to exercise its discretion to impose a concurrent or a consecutive sentence on count 3. (See *Deloza, supra*, 18 Cal.4th at p. 600 [trial court erroneously believed the law required consecutive sentences]; *People v. Carrasco* (2008) 163 Cal.App.4th 978, 994-995 [same].)¹⁰

B. *Any Forfeiture of the Argument That the Trial Court Failed To Exercise Its Sentencing Discretion Resulted from Ineffective Assistance of Counsel*

As noted, counsel for Keaton argued in her sentencing memorandum that the trial court had the discretion to and should impose concurrent rather than consecutive sentences on counts 2 and 3. Counsel for Keaton, however, did not object when the trial court stated that consecutive sentences were mandatory and imposed consecutive

¹⁰ Because the trial court erred in concluding that the law required a consecutive sentence on count 3, we do not reach defendants’ alternative arguments that the trial court abused its discretion by imposing a consecutive sentence in these circumstances and by failing to state the reasons for imposing a consecutive sentence, or that Keaton’s aggregate sentence is grossly excessive and constitutes cruel and unusual punishment.

sentences. Counsel for Hill neither argued the point in her sentencing memorandum nor objected at the time of sentencing.

“‘[C]omplaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal.’ [Citation.] ‘[C]laims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices’ are subject to forfeiture, including ‘cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or to give a sufficient number of valid reasons.’” (*People v. Boyce* (2014) 59 Cal.4th 672, 730-731 (*Boyce*)). A defendant forfeits such an argument by failing to object on that ground in the trial court.¹¹ (*Id.* at p. 730.) This forfeiture rule applies to a contention that the trial court erred in the manner in which it exercised its sentencing discretion. (See *Boyce*, *supra*, at p. 730 [failure to state reasons for imposing consecutive sentences]; *People v. Franco* (2014) 232 Cal.App.4th 831, 833-834 [failure to obtain a supplemental probation report]; *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1371-1372 [failure to cite adequate aggravating factors].) Whether it also applies to a contention that the court erroneously failed to exercise its discretion at all is another question, which we need not decide because any such forfeiture resulted from ineffective assistance of trial counsel for Keaton and Hill.¹²

¹¹ Defendants do not argue and have not shown that they did not have a meaningful opportunity to object in the trial court. (See *Boyce*, *supra*, 59 Cal.4th at p. 731.) In fact, the trial court stated to counsel for Hill at the sentencing hearing, “So if there’s anything that you or [counsel for Keaton] disagree with, you can always interrupt.” After announcing the sentence for each defendant, the trial court asked each defendant’s attorney whether she had anything further to say, and both lawyers said they did not.

¹² Defendants do not argue that there was no forfeiture because the failure to exercise sentencing discretion was a legal error that was “‘clear and correctable’ independent of any factual issues presented by the record at sentencing.” (*People v. McCullough* (2013) 56 Cal.4th 589, 594.) This language in the Supreme Court’s opinion in *McCullough*

““To establish ineffective assistance of counsel, a defendant must show that (1) counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel’s failings, the result would have been more favorable to the defendant.”” (*People v. Johnson* (2015) 60 Cal.4th 966, 979-980.) We defer to trial counsel’s reasonable tactical decisions and generally presume that counsel acted within the wide range of reasonable professional assistance. (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) On direct appeal a defendant claiming ineffective assistance of trial counsel must show that “(1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation.” (*Ibid.*)

The sentencing hearing occurred after the court had denied defendants’ new trial motion. The trial court stated its mistaken belief that a prior strike required a consecutive sentence on count 3 for both defendants. There was no rational tactical reason for defendants’ trial counsel to refrain from objecting that the trial court had misstated the law and for not arguing that the three strikes law did not require a consecutive sentence in these circumstances. Keaton and Hill could not conceivably have gained any advantage by withholding such an objection. Defendants’ trial counsel rendered ineffective assistance in this regard. (See *People v. Smith* (2013) 212 Cal.App.4th 1394, 1408 [“there could be no acceptable tactical reason” for counsel’s failure to seek relief under a more favorable provision of the Sexually Violent Predator Act]; *People v. Peyton* (2009)

comes from *People v. Scott* (1994) 9 Cal.4th 331, which concerned an “unauthorized sentence.” (*Id.* at p. 354.) An unauthorized sentence is one that “could not lawfully be imposed under any circumstance in the particular case.” (*Scott, supra*, at p. 354; accord, *In re Sheena K.* (2007) 40 Cal.4th 875, 886.) Keaton and Hill do not argue that the trial court imposed an authorized sentence, only that the trial court failed to exercise its discretion in imposing consecutive sentences.

176 Cal.App.4th 642, 654 [no satisfactory explanation for trial counsel's failure to object to the addition of a charge after defendant had waived his right to a preliminary hearing].)

The failure to object was also prejudicial. The trial court reasonably could have found that the crimes against the two victims in the gas station market had closely related objectives and were not predominantly independent, that defendants committed those crimes against the two victims at essentially the same time and place, and that these and other considerations, on balance, justified concurrent rather than consecutive sentences, despite the aggravating circumstances.¹³ (See rule 4.425.) Therefore, there is a reasonable probability that the trial court would have imposed concurrent sentences had defendants' trial counsel objected. (See *People v Thimmes* (2006) 138 Cal.App.4th 1207, 1213 [there was a reasonable probability that, but for counsel's failure to inform the court that defendant had not been warned of the consequences of a prior strike, the defendant would have received a lighter sentence].)¹⁴

¹³ As noted, the record compels the conclusion that defendants committed the robberies on the same occasion.

¹⁴ We do not agree with the People that there is no reasonable probability that, but for counsel's deficient performance, the court would have imposed consecutive sentences because the trial court "emphasized the fact the crimes were against multiple victims." Counsel for Hill stated that count 3 merged with count 2. The trial court responded, "Well, I don't believe so. It is separate victims. I will say . . . that as to count 4 and count 5 I'm going to impose and stay the three years midterm under Penal Code section 654. But there were separate robbery victims." Thus, the court concluded that, because the two robberies involved different victims, section 654's prohibition against multiple punishments did not preclude sentencing Hill for both counts 2 and 3. The court's conclusion with respect to section 654, however, did not affect whether the sentence for count 3 should be consecutive or concurrent. "[S]ection 654 is irrelevant to the question of whether multiple current convictions are sentenced concurrently or consecutively." (*Deloza, supra*, 18 Cal.4th at p. 594.)

C. *A Remand for Resentencing Is Appropriate*

“Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to ‘sentencing decisions made in the exercise of the “informed discretion” of the sentencing court,’ and a court that is unaware of its discretionary authority cannot exercise its informed discretion.” (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1229.) If the trial court failed to exercise its discretion to select either concurrent or consecutive sentences based on a mistaken belief that consecutive sentences were mandatory, the reviewing court should remand the matter for resentencing. (*Deloza, supra*, 18 Cal.4th at p. 600; see *People v. Leon* (Jan. 13, 2016, F065532 et al.) 243 Cal.App.4th 1003, __ [2016 WL 156157 at *34] [“[t]he appropriate remedy is a limited remand to give the trial court an opportunity to exercise its discretion”]; *People v. Bolian* (2014) 231 Cal.App.4th 1415, 1421 [“when the record indicates the court misunderstood or was unaware of the scope of its discretionary powers, we should remand to allow the court to properly exercise its discretion”].)

The People argue that the record shows that the trial court considered and rejected leniency because the crimes involved multiple victims. Citing several cases in which the court declined to order resentencing despite a sentencing error involving consecutive sentences (*People v. Coelho* (2001) 89 Cal.App.4th 861, 889 (*Coelho*); *People v. Williams* (1996) 46 Cal.App.4th 1767, 1783 (*Williams*); *People v. Rojas* (1992) 11 Cal.App.4th 950, 959 (*Rojas*); *People v. Foster* (1992) 6 Cal.App.4th 1, 14 (*Foster*); *People v. Blessing* (1979) 94 Cal.App.3d 835, 839 (*Blessing*)), the People argue that a remand for resentencing would be an idle gesture in these circumstances.

The cases cited by the People, however, are distinguishable for at least two reasons. First, the trial court in each case, rather than failing to exercise discretion, actually exercised its discretion to impose consecutive sentences. The error the trial court committed in each of the cases cited by the People was either failing to state any reason for imposing consecutive sentences (*Coelho, supra*, 89 Cal.App.4th at p. 889; *Williams*,

supra, 46 Cal.App.4th at p. 1783, *Rojas, supra*, 11 Cal.App.4th at p. 959; *Blessing, supra*, 94 Cal.App.3d at p. 839) or relying on an invalid reason (*Foster, supra*, 6 Cal.App.4th at p. 13). In contrast, the trial court here mistakenly believed that it had to impose consecutive sentences and failed to exercise its discretion to select either concurrent or consecutive sentences. The purpose of remanding for resentencing in this case is for the trial court to exercise that discretion.

Second, the court in each of the cases cited by the People concluded, either expressly or in effect, that there was no reasonable probability the trial court would impose a different sentence on remand. (*Coelho, supra*, 89 Cal.App.4th at p. 889; *Williams, supra*, 46 Cal.App.4th at p. 1783, *Rojas, supra*, 11 Cal.App.4th at p. 959; *Foster, supra*, 6 Cal.App.4th at p. 14; *Blessing, supra*, 94 Cal.App.3d at p. 839.) For example, the court in *Blessing* stated that the record showed the crimes satisfied all of the criteria the trial court should consider in deciding whether to impose consecutive rather than concurrent sentences, and found that there was “a total absence of any mitigating circumstances.” (*Id.* at p. 839; see *People v. Whitehouse* (1980) 112 Cal.App.3d 479, 486 [distinguishing *Blessing* on this basis].) In contrast, the record in this case and the criteria set forth in rule 4.425 do not compel the conclusion that the trial court on remand, in the exercise of its discretion, necessarily will impose consecutive sentences.

D. Section 12022.53, Subdivision (d), Is Not Unconstitutional

Keaton argues that section 12022.53, subdivision (d), violates the prohibitions against cruel and unusual punishment in the United States Constitution (8th Amend.) and the California Constitution (art. I, § 17) because it imposes an enhancement of 25 years to life without taking into account gradations in culpability, the severity of the offense, and mitigating factors. Keaton acknowledges that in *People v. Martinez* (1999) 76 Cal.App.4th 489 (*Martinez*) and *People v. Zepeda* (2001) 87 Cal.App.4th 1183 (*Zepeda*) the court rejected similar facial challenges to the statute’s constitutionality, but he argues that those cases were wrongly decided.

The court in *Martinez, supra*, 76 Cal.App.4th 489, stated, “Section 12022.53 as a whole represents a careful gradation by the Legislature of the consequences of gun use in the commission of serious crimes. The section is limited, in the first place, to convictions of certain very serious felonies. The statute then sets forth three gradations of punishment based on increasingly serious types and consequences of firearm use in the commission of the designated felonies: 10 years if the defendant merely used a firearm, 20 years if the defendant personally and intentionally discharged it, and 25 years to life if the defendant’s intentional discharge of the firearm proximately caused great bodily injury. Furthermore, the provision in question is an enhancement to the base term for the underlying conviction; a trial court retains flexibility as to fixing the underlying base term for [the conviction].” (*Id.* at p. 495, fn. omitted.) The *Martinez* court therefore concluded that the statute does recognize different gradations of culpability. (*Ibid.*; accord, *Zepeda, supra*, 87 Cal.App.4th at pp. 1214-1215.) The court in *Martinez* further stated, “Lines must be drawn somewhere, and the Legislature has reasonably drawn the line at great bodily injury. The fact that subdivision (d) leaves no additional room for trial court discretion based on different gradations of great bodily injury does not render the punishment cruel or unusual.” (*Martinez, supra*, at p. 495.) We agree and conclude that section 12022.53, subdivision (d), is not facially unconstitutional.

As noted, we need not address Keaton’s argument that section 12022.53, subdivision (d), as applied to him, resulted in an aggregate sentence that is grossly excessive or constitutes cruel and unusual punishment. Section 12022.53, subdivision (f), required the court to impose an enhancement of 25 years to life under subdivision (d) as to each of Keaton’s robbery convictions even though only one victim suffered great bodily injury. (*People v. Oates* (2004) 32 Cal.4th 1048, 1056-1057 (*Oates*); see *People v. Frausto* (2009) 180 Cal.App.4th 890, 898-903.) As the Supreme Court stated in *Oates*, however, “a trial court can mitigate concerns about sentencing inequities by imposing concurrent, rather than consecutive, sentences where multiple subdivision (d) enhancements are found true.” (*Oates, supra*, at p. 1060.) The trial court will have the opportunity on remand to exercise its discretion and determine whether to impose

consecutive or concurrent sentences, which may affect Keaton's argument regarding the constitutionality of his sentence.

DISPOSITION

The judgments are reversed as to the sentences of both defendants on count 3, with directions to the trial court to resentence both defendants on count 3, exercising its discretion to impose either concurrent or consecutive sentences and stating on the record the reasons for its sentencing decisions. In all other respects, the judgments are affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.