Filed 1/7/20 P. v. Mackey CA2/6

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DEMARIE RASHAD MACKEY,<br><br>Defendant and Appellant. | 2d Crim. No. B295661<br>(Super. Ct. No. 2013020687)<br>(Ventura County) |

Demarie Rashad Mackey appeals from the judgment entered after a jury convicted him of four counts of robbery and one count of attempted robbery. (Pen. Code, §§ 211, 664/211.)[1] As to three of the robbery counts (counts 1-3), the jury found true an allegation that appellant had used a firearm within the meaning of section 12022.53, subdivision (b). The trial court found true allegations that appellant had served one prior prison

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

term (§ 667.5, subd. (b)) and had been convicted of two prior serious felonies (§ 667, subd. (a)(1)) and two prior serious or violent felonies ("strikes") within the meaning of California's "Three Strikes" law. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) Appellant was sentenced to prison for 71 years to life.

Appellant contends that (1) the trial court erred in refusing to exclude his statements to the police because he had not knowingly and voluntarily waived his *Miranda* rights,[2] (2) the evidence is insufficient to support the true findings on the firearm-use enhancements, (3) the trial court abused its discretion in denying his motion to dismiss the prior felony convictions and the firearm-use enhancements, (4) his sentence of 71 years to life constitutes cruel and/or unusual punishment under the federal and state constitutions, and (5) the one-year prior prison term enhancement (§ 667.5, subd. (b)) must be stricken because of newly enacted Senate Bill No. 136.

We strike the one-year prior prison term enhancement effective January 1, 2020. This reduces appellant's sentence to 70 years to life. On our own motion, we further reduce appellant's sentence to 65 years to life because the trial court imposed two five-year prior serious felony conviction enhancements (§ 667, subd. (a)(1)) when it was authorized to impose only one enhancement. We also vacate unauthorized section 654 stays on counts 2, 3, and 5. In all other respects, we affirm.

*Facts*

On April 1, 2013, appellant entered the Citibank branch office in Camarillo. He was wearing a face mask. Appellant jumped over the counter and "yelled something . . . like,

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

everybody put your hands up." He pointed a handgun at three tellers and demanded their money. He said to teller Angelica Vigil, "Don't fucking move; don't fucking move and give me the money." He also told her to "move the fuck away" from the alarm, which was near her. Each of the three tellers gave money to appellant. The total amount taken was $19,180. The Citibank robberies were charged in counts 1, 2, and 3 of the information – one count for each of the three tellers.

On May 16, 2013, appellant entered a Chase Bank branch office in Simi Valley. He "hop[ped] over the counter . . . and he walk[ed] towards [teller Joanne Dao] with a mask on." Appellant threw a black bag at Dao's feet and demanded that she put money into the bag. Dao complied with the demand. Appellant was pointing a gun at her. "It looked like a revolver. It . . . had a barrel on it."

Appellant saw Dao's colleague, Jesse Mazza, and ordered him to come over to where appellant and Dao were standing. Mazza complied with the order. Appellant pointed his gun "towards [Mazzo's] front midsection." He asked Dao and Mazza where "the rest of the money" was located. They "[told] him that [they did not] have access to any other cash."

Appellant forced Mazza and Dao to lead him to the bank's vault. While Mazza and Dao were walking there, appellant pointed his gun "towards [their] heads." Upon reaching the vault, appellant demanded that Mazza and Dao open it. Mazza and Dao insisted that they did not have access to the vault. Appellant "got so frustrated that he just ran out and left."

The total amount taken from Chase Bank was $1,946.50. The robbery of Dao was charged in count 4 of the information. The attempted robbery of Mazza was charged in count 5. Both

counts alleged firearm-use enhancements (§ 12022.53, subd. (b)), but they were struck pursuant to the People's motion immediately before the jury returned its verdict.[3]

During interrogation by the police, appellant confessed to the Citibank and Chase Bank robberies.

*The Trial Court Did Not Err in Denying Appellant's Motion to Exclude His Statements Based on a Violation of Miranda*

Appellant argues: "There is no question but that police clearly explained appellant's *Miranda* rights and that appellant clearly waived them. However, prior to explaining these rights and appellant waiving same, the police intentionally misled appellant and/or lied about (1) the role and loyalty of counsel, (2) appellant's personal right to remain silent or to testify at trial, and (3) the role of the police themselves. [¶] As such, it cannot be said that appellant's waiver of his right to counsel and his right to remain silent . . . were knowing and voluntary. Therefore, the court erred in denying appellant's motion to suppress [his] statements."

The alleged deception by the police is based solely on the following remarks made before appellant was advised of his *Miranda* rights: "You know your attorney's not gonna let you get on the stand. That ain't gonna happen, okay. This is about the only time you get to really say what your side of it's gonna be.[4]

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[3] The abstract of judgment erroneously shows that the court imposed and stayed firearm-use enhancements on counts 4 and 5.

[4] The Attorney General submits that this "comment was . . . objectively accurate − albeit colloquial – assessment of appellant's situation. Given the circumstances of appellant's arrest (literally holding a bag of cash), and his prior convictions

And we'll write it down." Appellant contends that, by these remarks, the police "in substance . . . told appellant that he should trust the police, not his lawyer, and that if appellant did not talk to them he would never again have the opportunity to tell his side of the story." But counsel cannot deprive a defendant of his right to testify at trial. (*People v. Robles* (1970) 2 Cal.3d 205, 215 ["the right to testify in one's own behalf is of such fundamental importance that a defendant who timely demands to take the stand contrary to the advice given by his counsel has the right to give an exposition of his defense before a jury"].)

"The inquiry [into whether appellant waived his right to counsel and to remain silent] has two distinct dimensions. [Citations.] First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." (*Moran v. Burbine* (1986) 475 U.S. 412, 421.)

The standard of review is de novo: "An appellate court applies the independent or de novo standard of review, which by its nature is nondeferential, to a trial court's granting or denial of a motion to suppress a statement under *Miranda* insofar as the trial court's underlying decision entails a measurement of the facts against the law." (*People v. Waidla* (2000) 22 Cal.4th 690,

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for a similar robbery spree . . . , any competent attorney would have done his utmost to keep appellant from testifying."

730.) "After independent review, we believe that the [trial] court did not err in denying [appellant's] motion." (*Ibid*.)

The police falsely told appellant that he would never again have the opportunity to present his side of the story because his counsel would not allow him to testify at trial. This misrepresentation should not have been made and the police should not speculate about what defense could, will, or will not do. But, this statement was not coercive and did not render appellant's *Miranda* waiver involuntary. In *People v. Molano* (2019) 7 Cal.5th 620, 653 (*Molano*), the California Supreme Court concluded that an officer's ruse did not invalidate the defendant's *Miranda* waiver because the ruse "was not coercive." The court noted that in *Colorado v. Spring* (1987) 479 U.S. 564 (*Spring*), the high court had "cited examples of 'certain circumstances' under which [it] had previously invalidated Fifth Amendment waivers; those examples all involved misrepresentations that were coercive in nature. (*Spring*, *supra*, [at p.] 576, fn. 8 . . . citing *Lynumn v. Illinois* (1963) 372 U.S. 528, 534–535 . . . [misrepresentation by police officers that suspect would be deprived of state financial aid for her dependent child unless she cooperated]; *Spano v. New York* (1959) 360 U.S. 315, 319 . . . [misrepresentation by suspect's friend that friend would lose his job if suspect failed to cooperate].)" (*Molano*, *supra*, at p. 653.)

Thus, "[a]bsent evidence that [appellant's] 'will [was] overborne and his capacity for self-determination critically impaired' because of coercive police conduct, [citations], his waiver of his Fifth Amendment privilege was voluntary under [the Supreme] Court's decision in *Miranda*." (*Spring*, *supra*, 479 U.S. at p. 574.)

"There also is no doubt that [appellant's] waiver of his Fifth Amendment privilege was knowingly and intelligently made: that is, that [he] understood that he had the right to remain silent and that anything he said could be used as evidence against him. . . . [¶] . . . [T]here is no allegation that [appellant] failed to understand the basic privilege guaranteed by the Fifth Amendment. Nor is there any allegation that he misunderstood the consequences of speaking freely to the law enforcement officials. In sum, we think that the trial court was indisputably correct in finding that [appellant's] waiver was made knowingly and intelligently within the meaning of *Miranda*." (*Spring*, *supra*, 479 U.S. at pp. 574-575.)

*Substantial Evidence Supports the Firearm-Use Enhancements*

Appellant contends that the evidence is insufficient to support the true findings on the firearm-use enhancements as to counts 1, 2, and 3 involving the Citibank robbery. The firearm used in that robbery was not recovered. Appellant claims that the evidence fails to meet the requirement that, although the firearm need not be operable, it must have been "designed to shoot and g[i]ve the reasonable appearance of a shooting capability." (*People v. Nelums* (1982) 31 Cal.3d 355, 360 (*Nelums*); see § 12022.53, subd. (b) ["The firearm need not be operable or loaded for this enhancement to apply"].)

"As used in . . . section [12022.53, subd. (b)], '"firearm" means any device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of any explosion or other form of combustion.' [¶] Thus, toy guns obviously do not qualify as a 'firearm,' nor do pellet guns or BB guns . . . ." (*People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1435 (*Monjaras*).)

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' . . . [A] reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Edwards* (2013) 57 Cal.4th 658, 715.)

Victim Gilbert Maldonado described the weapon as "a handgun." He did not "see any bright colored orange, red, other colored dots or indicators on the gun to indicate that it was not a real firearm." Nor did he "see any bright colored warning stickers or warning symbols on the gun that indicated . . . it was obviously fake." Nevertheless, Maldonado thought that the firearm "looked fake" because "it was so shiny and glossy." But Maldonado was neither "a gun enthusiast" nor "a gun expert." He had "gone to the shooting range once."

Victim Angelica Vigil described the handgun as "silver in color" with "a long barrel." She believed that the gun "may not have been real" because "it appeared . . . that the gun was very light by the way [appellant] gripped the handle and manipulated it during the robbery." But Vigil "had never handled a gun or held a gun."

The victims' inability to say whether the gun was real does not render the evidence insufficient. "[W]hen as here a defendant commits a robbery by displaying an object that looks like a gun, the object's appearance and the defendant's conduct and words in using it may constitute sufficient circumstantial evidence to

support a finding that it was a firearm within the meaning of section 12022.53, subdivision (b). In other words, the victim's inability to say conclusively that the gun was real and not a toy does not create a reasonable doubt, as a matter of law, that the gun was a firearm." (*Monjaras*, *supra*, 164 Cal.App.4th at p. 1437.) "[W]hen faced with what appears to be a gun, displayed with an explicit or implicit threat to use it, few victims have the composure and opportunity to closely examine the object; and in any event, victims often lack expertise to tell whether it is a real firearm or an imitation." (*Id.* at p. 1436.)

During his interrogation by the police, appellant made clear that the gun was real. He described it as "like a revolver-type. . . . [L]ike a older type gun. It had a clip to it . . . ." We take judicial notice that "[a] clip is a device that is used to store multiple rounds of ammunition together as a unit, ready for insertion into the magazine or cylinder of a firearm." <https://en.wikipedia.org/wiki/Clip_(firearms)> [as of Nov. 8, 2019], archived at <https://perma.cc/3EM2-6A3R>. Accordingly, viewing the evidence in the light most favorable to the judgment, we conclude that a reasonable trier of fact could find beyond a reasonable doubt that the firearm used in the Citibank robbery was a real gun "designed to shoot and g[i]ve the reasonable appearance of a shooting capability." (*Nelums*, *supra*, 31 Cal.3d at p. 360.)

*The Trial Court Did Not Abuse Its Discretion in Refusing to Strike the Prior Felony Convictions*

Appellant claims that the trial court abused its discretion in denying his motion to dismiss all of the prior felony convictions pursuant to section 1385, which empowers a court to dismiss an action "in furtherance of justice." (§ 1385, subd. (a).) "[A] trial

court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion." (*People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*).)

"'[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law . . . "in furtherance of justice" pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.'" (*Carmony*, *supra*, 33 Cal.4th at p. 377.)

The trial court did not abuse its discretion. Appellant was only 23 years old when he committed the present offenses in 2013. Despite his youth, he has a serious criminal record that includes crimes of violence. In 2005 when he was 15 years old, appellant committed grand theft from the person. Less than a month later, he committed two burglaries and two grand thefts from the person. Juvenile petitions were sustained as to these offenses. Appellant was committed to a camp-community placement program for three years, eight months.

In 2008 when he was 18 years old, appellant was convicted of robbery and first degree burglary, the two strikes pursuant to the Three Strikes law. He was sentenced to prison for five years. The 2008 probation report stated: "From 7-8-07, thru 11-29-07, [appellant] went on a crime spree, breaking into people's homes,

robbing . . . stores at gunpoint, [and] fleeing the scene . . . . [H]e was detained after he grabbed three necklaces out of a jewelry display case . . . . When the sheriff arrived he was arrested for this and all his other cases." The 2008 probation officer opined: "[Appellant] preyed upon his neighbors, the convenience stores, and the jewelers of this community. He did so wildly and without any restraint. . . . This type of dangerous, threatening behavior is intolerable . . . ."

Appellant was paroled on August 29, 2012. In 2013 he was convicted of two counts of robbery and sentenced to prison for 60 years to life. The crimes were committed on May 25, 2013, only seven days after the commission of the robbery and attempted robbery at Chase Bank in the present case. According to the probation report in the present case, "[w]hile wearing a mask and gloves," appellant entered a Bank of America branch office and "robbed two bank tellers at gunpoint." He "ran out of the bank with the bag of money (approximately $19,549.00)."

The probation officer in the present case opined: "[D]efendant's prior record indicates a dangerous pattern of thievery and victimization, and his conduct has gone unabated, despite serious consequences such as imprisonment and community supervision. . . . [T]here is no indication that the defendant would have stopped his criminal behavior, had he not been detected and arrested by law enforcement. He has demonstrated by his actions that he is a danger to the community at large . . . ."

In denying appellant's motion to dismiss the prior convictions, the trial court said: "It looks like he made no effort to appropriately return to society." This is "just not the kind of a matter where I would strike prior convictions . . . . They're just

too close in time and, essentially, of the same type of criminal behavior." "[T]his is not the kind of conduct that anyone can tolerate in a civilized society."

"[A] trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]. Moreover, 'the sentencing norms [established by the Three Strikes law may, as a matter of law,] produce [ ] an "arbitrary, capricious or patently absurd" result' under the specific facts of a particular case." (*Carmony*, *supra*, 33 Cal.4th at p. 378, last two pairs of brackets in original.) The trial court's refusal to strike the prior felony convictions here does not fall within any of the "limited circumstances" where an abuse of discretion may be found. (*Ibid*.) The court acted within its discretion in view of appellant's serious and violent criminal record, the violent nature of the present offenses, and his failure to rehabilitate himself as a juvenile while in a camp-community placement program and as an adult while in prison and on parole. The trial court reasonably concluded that, because of the "'particulars of his background, character, and prospects, [appellant] may [not] be deemed outside the . . . spirit'" of the Three-Strikes scheme. (*Id.* at p. 377.)

*The Trial Court Did Not Abuse Its Discretion in Refusing to Strike the Firearm-Use Enhancements*

"The 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 . . . [section 12022.53]." (§ 12022.53, subd. (h).) Appellant maintains that the

trial court abused its discretion in denying his motion to strike the firearm-use enhancements in counts 1, 2, and 3 pursuant to section 1385. For the same reasons that the trial court did not abuse its discretion in refusing to strike the prior convictions, it also did not abuse its discretion in refusing to strike the firearm-use enhancements.

*Senate Bill No. 136*

Effective January 1, 2020, Senate Bill No. 136 amended section 667.5, subdivision (b) to provide, "[T]he court shall impose a one-year term for each prior separate prison term for a sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code . . . ." (Stats. 2019, ch. 590, § 1.) In a supplemental letter brief, appellant contends that we must strike the one-year prior prison term enhancement because the prison term was not served for a sexually violent offense.

The People concede that appellant's contention has merit. We agree. "'When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final.'" (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 307.)

The judgment will not be final on January 1, 2020, when Senate Bill No. 136 takes effect. We therefore order that,

effective January 1, 2020, appellant's one-year prior prison term enhancement be stricken.

*Unauthorized Sentence*

The court found true two prior serious felony convictions within the meaning of section 667, subdivision (a)(1) (667(a)(1)). It erroneously imposed consecutive five-year terms for each of the prior convictions. The convictions were for first degree burglary and robbery. The offenses were charged together in Los Angeles Sup. Ct. case no. MA042066. Appellant pleaded guilty to both offenses on November 25, 2008. He was sentenced to four years for the burglary plus a consecutive term of one year (one-third the middle term of three years) for the robbery.

On count 1 (the Citibank robbery) of the information in the present case, the trial court imposed a consecutive term of five years for one section 667(a)(1) prior serious felony conviction for a total of 41 years to life on that count. On count 4 (the Chase Bank robbery) it imposed a consecutive term of five years for the other prior serious felony conviction for a total of 30 years to life on that count.[5] Because the two prior serious felony convictions

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[5] The court minutes correctly state, "The court finds prior 667(a)(1) PC [as to count 4] . . . true. Court imposes 5 Year(s) to be served Consecutive to count 4." But the minutes then incorrectly state, "Court exercises discretion and strikes the 667(a)(1) PC as to count 4." The reporter's transcript of the sentencing hearing shows that the trial court did not strike the section 667(a)(1) enhancement as to count 4. The court said: "As to Count 4, you're sentenced to 25 years to life for the second degree robbery. [¶] And . . . you're sentenced to an additional and consecutive 5 years for the [section 667(a)(1)] prior . . . . [¶] I've exercised my discretion. I think it should be imposed. I likely would otherwise strike it under a different circumstance, but not in this case." The reporter's transcript prevails over the

had been charged together in the same case, the court could impose only one five-year enhancement for both convictions. Section 667(a)(1) provides: "Any person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction *on charges brought and tried separately*." (Italics added.)

"[T]he requirement in section 667 that the predicate charges must have been 'brought and tried separately' demands that the underlying proceedings must have been formally distinct, from filing to adjudication of guilt. Here, as the record plainly reveals, the charges in question were not 'brought . . . separately,' but were made in a single complaint [and subsequent information]." (*In re Harris* (1989) 49 Cal.3d 131, 136.) "Accordingly, we hold that under section 667 [appellant] was subject to only one 5-year enhancement, not two." (*Id*. at p. 137.)

The trial court appears to have erroneously believed that prior conviction enhancements attach to particular counts, since it imposed one five-year prior serious felony enhancement as to count 1 and the other as to count 4. "Section 1170.1 refers to two kinds of enhancements: (1) those which go to the nature of the

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minutes. (*People v. Price* (2004) 120 Cal.App.4th 224, 242 ["Any discrepancy between the minutes and the oral pronouncement of a sentence is presumed to be the result of clerical error. Thus, the oral pronouncement of sentence prevails in cases where it deviates from that recorded in the minutes"].) The abstract of judgment shows that the court imposed a separate, consecutive five-year term for each of the two section 667(a)(1) enhancements.

offender; and (2) those which go to the nature of the offense. Enhancements for prior convictions . . . are of the first sort. . . . Enhancements of the second kind enhance the several counts; those of the first kind, by contrast, have nothing to do with particular counts but, since they are related to the offender, are added only once as a step in arriving at the aggregate sentence." (*People v. Tassell* (1984) 36 Cal.3d 77, 90, overruled on another ground in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401.)

Neither party has raised the issue of the imposition of two five-year section 667(a)(1) enhancements. Nevertheless, the trial court's error is correctable under the unauthorized sentence concept. "[T]he 'unauthorized sentence' concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal. . . . [¶] . . . [A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing. [Citation.]" (*People v. Scott* (1995) 9 Cal.4th 331, 354 (*Scott*).) "[T]he sentence is 'subject to judicial correction whenever the error [comes] to the attention of the trial court or a reviewing court' . . . ." (*People v. Roth* (2017) 17 Cal.App.5th 694, 703.) Thus, we must strike one of the two section 667(a)(1) prior serious felony enhancements.

The trial court also imposed an unauthorized sentence when, pursuant to section 654, it stayed 25-year-to-life sentences under the Three Strikes law as to counts 2, 3, and 5.[6] As to count

[6] Section 654, subdivision (a) provides in relevant part: "An act or omission that is punishable in different ways by different

5, the attempted robbery of Mazza at Chase Bank, the court said: "That count is 654 to Count 4 [the robbery of Dao at Chase Bank]. It's the same circumstance, fact, daytime, and that's why I'm deciding that sentence is 654 to Count 4." But "[t]he section 654 proscription against multiple punishment does not apply to violations arising from an indivisible course of conduct if during the course of that conduct the defendant committed crimes of violence against different victims." (*People v. Masters* (1987) 195 Cal.App.3d 1124, 1127; see also *People v. Oates* (2004) 32 Cal.4th 1048, 1063 ["We have long held that 'the limitations of section 654 do not apply to crimes of violence against multiple victims'"].)

"It is well settled . . . that the court acts in 'excess of its jurisdiction' and imposes an 'unauthorized' sentence when it erroneously stays . . . a sentence under section 654. [Citations.]" (*Scott*, *supra*, 9 Cal.4th at p. 354, fn. 17.) "'Errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as error on appeal.'" (*People v. Hester* (2000) 22 Cal.4th 290, 295.) We therefore must vacate the erroneous section 654 stays even though the parties have not raised the issue in their briefs.

The vacation of the section 654 stays does not affect the length of appellant's aggregate sentence. As to each of counts 2, 3, and 5, under the Three Strikes law the trial court imposed a 25-year-to-life term without specifying whether it would run consecutively or concurrently. Consecutive sentencing was not

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provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

mandated because the crimes charged in counts 2 and 3 were committed on the same occasion (the Citibank robbery) as the crime charged in count 1, and the crime charged in count 5 was committed on the same occasion (the Chase Bank robbery) as the crime charged in count 4. (*People v. Deloza* (1998) 18 Cal.4th 585, 595-596.) "[T]he trial court therefore retained discretion to impose either concurrent or consecutive sentences." (*Id*. at p. 596.) Because the trial court did not specify whether the 25-year-to-life terms on counts 2, 3, and 5 run concurrently or consecutively, they are deemed to run concurrently. (§ 669; *People v. Downey* (2000) 82 Cal.App.4th 899, 915; *In re Robert S.* (1979) 92 Cal.App.3d 355, 363-364.)

We recognize that, pursuant to Government Code section 68081, the parties are entitled to an opportunity to brief the unauthorized sentence issues.[7] But this is a matter of blackletter law. In the interest of economy and to avoid an unnecessary delay of the proceedings, we have not asked the parties to file supplemental briefs. If either party has grounds to believe that we are wrong, they may timely file, and we will grant, a petition for a rehearing. (Gov. Code, § 68081.)

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[7] Government Code section 68081 provides, "Before . . . a court of appeal . . . renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party."

*Appellant's Sentence Does Not Violate the State and Federal Prohibitions Against Cruel and/or Unusual Punishment*

Appellant asserts that his 71-year-to-life prison sentence (now reduced to 65 years to life) violates the federal and state constitutional prohibitions against cruel and/or unusual punishment. "Under the Eighth Amendment of the United States Constitution, 'the courts examine whether a punishment is grossly disproportionate to the crime.' [Citation.] 'Under the California Constitution, a sentence is cruel or unusual if it is so disproportionate to the crime committed that it shocks the conscience and offends fundamental notions of human dignity.' [Citation.]" (*People v. Johnson* (2013) 221 Cal.App.4th 623, 636 (*Johnson*).)

"[A]ppellant's sentence is not disproportionate to his crime[s]. '*Harmelin v. Michigan* (1991) 501 U.S. 957 . . . upheld a sentence of LWOP [(life without the possibility of parole)] for possession of 672 grams of cocaine, a serious crime, but [far] less heinous than' the crimes committed by appellant. [Citation.]" (*Johnson*, *supra*, 221 Cal.App.4th at p. 636; see also *People v. Edwards* (2019) 34 Cal.App.5th 183, 186, 192 [no cruel and/or unusual punishment where two defendants, both 19 years old at the time of the crimes, were sentenced to 129 years to life and 95 years to life for joint sexual assault and robbery of a woman and robbery of her male friend, even though the defendants "had little prior criminal history and no prior history of committing sex offenses"].)

*Disposition*

The judgment is modified to strike one of the two section 667(a)(1) five-year prior serious felony conviction enhancements, to vacate the section 654 stays on counts 2, 3, and 5, and to strike

the one-year prior prison term enhancement (§667.5, subd. (b)) effective January 1, 2020. The sentences on counts 2 and 3 run concurrently to the sentence on count 1. The sentence on count 5 runs concurrently to the sentence on count 4. The modification reduces appellant's aggregate sentence from 71 years to life to 65 years to life. As modified, the judgment is affirmed. The trial court shall prepare an amended abstract of judgment showing the judgment as modified and shall send a certified copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

YEGAN, J., Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Jeffrey G. Bennett, Judge

Superior Court County of Ventura

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Leonard J. Klaif, under appointment by the Court of Appeal for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Acting Senior Assistant Attorney General, Michael R. Johnsen, Supervising Deputy Attorney General, David W. Williams, Deputy Attorney General, for Plaintiff and Respondent.