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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JIMMY EUGENE ASKEW et al., Defendants and Appellants.	B229838 (Los Angeles County Super. Ct. No. NA085228)

APPEALS from a judgment of the Superior Court of Los Angeles County, Charles D. Sheldon, Judge. Affirmed as modified.

Law Offices of John F. Schuck and John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant Jimmy Eugene Askew.

Renee Paradis, under appointment by the Court of Appeal, for Defendant and Appellant Edward Byrd.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendants Jimmy Eugene Askew and Edward Byrd were convicted of an attempted robbery and burglary of a store (first incident), an attempted robbery and attempted burglary of another store (second incident), and several firearm offenses. The jury also found that defendant Askew personally used a firearm and that a principal was armed with a firearm.

In their appeals from the judgment, defendants contend that: (1) as to the second incident, the intent and overt act elements of attempted robbery and attempted burglary were not proven; (2) the finding that a principal was armed with a firearm must be reversed because the allegation was omitted from the amended information; (3) defendant Askew's abstract of judgment erroneously refers to a dismissed count; (4) they must be resentenced because the trial court did not obtain presentence probation reports; (5) defendant Byrd's prior prison term enhancements must be stricken for insufficient evidence; and (6) they are entitled to additional presentence custody credits.

We reject defendants' claims of insufficient evidence but conclude that their sentences must be corrected as discussed in this opinion. As modified, the judgment is affirmed.

FACTS AND PROCEDURAL BACKGROUND

Within a 20-minute period on March 31, 2010, two men attempted to rob two stores that are less than a mile apart on the same street. The first store, C.I. Market, is located within the Los Angeles Police Department's (LAPD) jurisdiction at 1658 West Carson Street. The second store, Anchorage Liquor Store, is located within the Los Angeles County Sheriff's Department's jurisdiction at 1037 West Carson Street.

I. The First Incident at C.I. Market

At approximately 10:40 p.m. on March 31, 2010, C.I. Market owner Ki Duk Kim was watching television inside his store when a masked gunman (later identified as defendant Askew) grabbed him by the shoulder while a masked accomplice (later

identified as defendant Byrd) stood outside acting as a lookout. Kim realized that he was going to be robbed and immediately squatted down to break free of the gunman's grasp and ran outside screaming for the police. The suspects fled from the store and ran south toward Western Avenue. Kim followed them until they turned around to look at him, at which point he went back to the store and called 911.

LAPD Officer Jaroen Hitanukulkit and his partner responded to Kim's 911 call at 10:48 p.m. After observing the two masked suspects on the store's surveillance videotape, Hitanukulkit broadcast a description of both men.

II. The Second Incident at Anchorage Liquor Store

At approximately 11:00 p.m. that same night, sheriff's deputies apprehended defendants outside Anchorage Liquor Store, less than a mile down the street from C.I. Market. Defendants were no longer wearing masks and gloves, but were in the same clothing and shoes that they were wearing in the C.I. Market surveillance videotape. The events leading to their arrests were as follows.

Shortly before 11:00 p.m., Anchorage Liquor Store employees Salvador Vargas and Juan Romero were working inside the store, which was closed, when a man (defendant Byrd) knocked on the store's glass door. Without opening the door, Vargas waved his finger "no" and told the man that the store was closed.

At the same time, Deputy Sheriff Michael Chacon and his partner were driving by in their patrol car when they saw defendants walking together toward Anchorage Liquor Store. As they watched, Byrd "either knocked or pulled on the handle of the door," which "was apparently locked." Askew, who was standing in the store's parking lot, looked around, saw the patrol car, and said something to Byrd. Byrd turned to look at the patrol car and immediately left in one direction while Askew left in the other direction.[1]

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[1] Romero's brother-in-law, Jose Alvarado, testified that he was waiting in front of the store for Romero, whose shift was supposed to end at 11:00 p.m. As Alvarado was waiting, two men came by and one of them asked him if the store was closed. After he

Finding their behavior suspicious,[2] Deputy Chacon drove alongside Byrd and said, "'Hey, Buddy.'" Byrd ignored the remark and, as he continued walking, pulled from his waistband a small dark object that fell from his hand. Chacon stopped the car and, while Byrd was detained by his partner, began looking for the dropped object. Chacon found a loaded handgun in a planter box next to the curb. After Askew was detained by other deputies at a pay phone south of the liquor store, both men were taken to the sheriff's station in Carson.

Upon learning that two men had been arrested outside a liquor store near C.I. Market, Officer Hitanukulkit went to the Carson sheriff's station at 2:00 a.m. to see if the men matched the suspects depicted in the C.I. Market surveillance videotape. Upon observing defendants in the same shoes and clothing worn by the suspects in the videotape, Officer Hitanukulkit identified defendant Askew as the gunman and defendant Byrd as the accomplice in the burglary and attempted robbery at C.I. Market.

III. The Charges

Counts 1 and 2 — C.I. Market. As to the first incident, defendants were charged with attempted second degree robbery of storeowner Kim (Pen. Code, §§ 664, 211, count 1)[3] and second degree burglary of C.I. Market (§ 459, count 2). Count 1 alleged that defendant Askew personally used a firearm within the meaning of section 12022.53, subdivision (b). Count 2 alleged that defendant Askew personally used a firearm within the meaning of section 12022.5, subdivision (a).

Counts 3, 4, 5 — Anchorage Liquor Store. As to the second incident, defendants were charged with attempted second degree robbery of store employees Vargas (count 3)

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answered yes, one man went to the pay phone and the other man "walked back in the direction where he came from."

[2] Deputy Chacon testified: "It seemed suspicious to me that two people walking together, that appeared to be having a conversation, go up to a store; suddenly it appeared that they had seen the police and immediately left in different directions."

[3] All further statutory references are to the Penal Code.

and Romero (count 4), and attempted second degree burglary of Anchorage Liquor Store (count 5). All three counts alleged that defendant Byrd personally used a firearm within the meaning of section 12022.5, subdivision (a).

Counts 6, 7, 8, 9 — Firearm Offenses. Each defendant was charged with one count of possession of a firearm by a felon (§ 12021, subd. (a)(1), count 6 [defendant Askew], count 8 [defendant Byrd]), and one count of carrying a concealed firearm (§ 12025, subd. (a)(2), count 7 [defendant Askew], count 9 [defendant Byrd]).

Count 10 — Conspiracy. Defendants were charged with conspiracy to commit robbery (§ 182, subd. (a)(1), count 10).

Section 12022, Subdivision (a) Allegation. The information alleged, as to all 10 counts, that a principal was armed with a firearm. (§ 12022, subd. (a).)

Prior Conviction Allegations. Both defendants were alleged to have served prior prison terms within the meaning of section 667.5, subdivision (b). Defendant Askew was alleged to have suffered one prior conviction of a serious or violent felony (§ 211, robbery) within the meaning of section 667, subdivisions (b) through (i), and section 1170.12, subdivisions (a) through (d). Askew was also alleged to have suffered a prior serious felony conviction (§ 211, robbery) within the meaning of section 667, subdivision (a)(1).

IV. The First and Second Trials, Convictions, and Sentences

After the first trial ended in a mistrial, the conspiracy charge (count 10) and personal firearm use allegation against defendant Byrd (§ 12022.5, subd. (a), counts 3-5) were dismissed on the prosecution's motion.

Defendants were retried on counts 1 through 9. The trial court granted defendants' motion to dismiss count 4 (attempted robbery of Romero) prior to deliberations. The jury received instructions and verdict forms on counts 1 through 3 and 5 through 9. The verdict forms requested findings on the allegations that defendant Askew personally used a firearm (§ 12022.53, subd. (b), count 1; § 12022.5, subd. (a), count 2) and that a principal was armed with a firearm (§ 12022, subd. (a), counts 1-3, 5-9).

The jury found defendants guilty on all counts and found the personal firearm use and principal armed allegations to be true.

Following the denial of his motion to strike his prior "strike" conviction (§ 211, robbery), Askew admitted both the prior strike and the prior serious felony conviction. Askew received a 23-year sentence comprised of: (1) six years on count 1, attempted robbery of Kim (the high base term of three years, doubled to six years as a second strike), plus 10 years for the personal firearm use enhancement under section 12022.53, subdivision (b), plus five years for the serious felony enhancement under section 667, subdivision (b); (2) a consecutive 16 months on count 3, attempted robbery of Vargas (one-third the middle term of two years, doubled to 16 months as a second strike); and (3) a consecutive eight months on count 7, carrying a concealed firearm (one-third the middle term of two years).[4]

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[4] The Attorney General correctly points out that defendant Askew's abstract of judgment erroneously reflects a sentence of 21 years, eight months. The 16-month discrepancy resulted from the abstract's failure to reflect: (1) the doubling of Askew's sentence on count 3 (attempted robbery of Vargas) from eight months to 16 months; and (2) the consecutive eight-month sentence imposed on count 7 (carrying a concealed firearm). We therefore order that the abstract be corrected to reflect Askew's actual sentence of 23 years. (See *In re Harris* (1993) 5 Cal.4th 813, 842 [appellate court may correct a sentence that is not authorized by law whenever the error comes to its attention]; *People v. Mitchell* (2001) 26 Cal.4th 181, 183, 185-188 [where the Attorney General identifies a discrepancy between the abstract of judgment and the sentence that was imposed, the appellate court should order the trial court to correct the abstract of judgment].)

In addition, we have discovered a section 654 error in Askew's sentence that must be corrected. Under section 654, the trial court stayed the imposition of Askew's sentence on counts 2 (second degree burglary of C.I. Market), 5 (attempted second degree burglary of Anchorage Liquor Store), and 6 (possession of a firearm by a felon [defendant Askew]). However, staying the imposition of sentence was not an option because a trial court "'must either sentence the defendant or grant probation in a lawful manner; it has no other discretion.' [Citation.] [¶] A sentence must be imposed on each count, otherwise if the nonstayed sentence is vacated, either on appeal or in a collateral attack on the judgment, no valid sentence will remain. A seminal case—*People v. Niles* (1964) 227 Cal.App.2d 749 . . . —found a procedural solution: A trial court can impose sentence on all counts, and then stay execution of sentence as necessary to comply with section 654; that way, if the unstayed sentence is reversed, a valid sentence remains

Byrd received a sentence of seven years, four months, which the Attorney General correctly points out should be six years, eight months. The error occurred in count 3, when the trial court imposed a full consecutive one-year enhancement under section 12022, subdivision (a), which must be reduced under sections 1170.1 and 1170.11 to four months (one-third of one year).

With that correction, Byrd's sentence of six years, eight months consists of the following consecutive terms: (1) two years on count 1, attempted robbery of Kim (the middle term), plus one year for the principal armed enhancement under section 12022, subdivision (a), plus two 1-year enhancements for his prior prison terms under section 667.5, subdivision (b); (2) eight months on count 3, attempted robbery of Vargas (one-third the middle term of two years), plus four months (one-third of one year) for the principal armed enhancement under section 12022, subdivision (a); and (3) eight months on count 8, carrying a concealed firearm (one-third the middle term of two years).[5]

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intact. [Citations.]" (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1468-1469 (*Alford*).)

The proper procedure was to impose sentence on counts 2, 5, and 6 and then stay execution of sentence under section 654. Given the trial court's selection of the middle term on count 3 (attempted second degree robbery of Vargas), the middle term is undoubtedly the sentence the trial court would have imposed on counts 2, 5, and 6, because they involved essentially the same conduct. (See *Alford*, *supra*, 180 Cal.App.4th p. 1473 [appellate court corrected unauthorized sentence by imposing and staying a midterm sentence on the grand theft count].) In order to correct the unauthorized sentence, we will impose and stay the middle term sentences on counts 2, 5, and 6 under section 654 and direct that Askew's abstract of judgment be amended accordingly.

[5] We order that the abstract of judgment for defendant Byrd be corrected to reflect a sentence of six years, eight months.

As previously discussed with regard to defendant Askew, it was improper to stay the imposition of Byrd's sentence on counts 2 (second degree burglary of C.I. Market), 5 (attempted second degree burglary of Anchorage Liquor Store), and 8 (possession of a firearm by a felon [defendant Byrd]) under section 654. (*Alford*, *supra*, 180 Cal.App.4th at pp. 1468-1469.) We therefore will impose and stay the middle term sentence on counts 2, 5, and 8 under section 654 and direct that Byrd's abstract of judgment be amended accordingly.

DISCUSSION

I. Substantial Evidence Supports the Convictions on Counts 3 and 5

Defendants contend their convictions of attempted robbery (count 3) and attempted burglary (count 5) of Anchorage Liquor Store must be reversed for insufficient evidence of their intent to take the property of another and their commission of a direct but ineffectual act that went beyond mere preparation. We conclude the contention lacks merit.

A. Standard of Review

"'"The standard of review is well settled: On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses 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. [Citations.] '"[I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder."' [Citation.] 'The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] "Although it is the duty of the [finder of fact] to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the [finder of fact], not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt."'" [Citation.]

"'"An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence." [Citation.] "Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact]."' [Citation.]" (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1426.)

"When the evidence justifies a reasonable inference of felonious intent, the verdict may not be disturbed on appeal. [Citations.]" (*People v. Matson* (1974) 13 Cal.3d 35, 41.) "It is not enough for defendant to simply say 'there was no evidence'; instead, 'he must *affirmatively demonstrate* that the evidence is insufficient' on the point in dispute. [Citation.] . . . The People do not bear the burden of showing the conviction is supported by substantial evidence; instead, because 'we *must* begin with the presumption that the evidence . . . *was* sufficient,' it is defendant, as the appellant, who 'bears the burden of convincing us otherwise.' [Citation.]" (*People v. Hamlin*, *supra*, 170 Cal.App.4th at p. 1430.)

B. The Intent and Overt Act Requirements for Attempted Robbery and Attempted Burglary

"An attempt to commit a crime is comprised of 'two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.' (§ 21a . . . .)" (*People v. Medina* (2007) 41 Cal.4th 685, 694 (*Medina*).) According to the general attempt principles, "[o]ther than forming the requisite criminal intent, a defendant need not commit an element of the underlying offense. [Citations.]" (*Ibid*.)

Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) An attempted robbery "requires a specific intent to commit robbery and a direct, ineffectual act (beyond mere preparation) toward its commission. [Citations.]" (*Medina*, *supra*, 41 Cal.4th at p. 694.) Because "commission of an element of the crime is not necessary . . . neither a completed theft [citation] nor a completed assault [citation] is required for attempted robbery. [Citation.]" (*Id.* at pp. 694-695.)

Burglary is the entry into a building "with intent to commit grand or petit larceny or any felony." (§ 429.) "The elements of larceny are that: (1) the property stolen be the *personal* property of another; (2) the taker took the property from the owner's possession without his consent; (3) the taker asported the property; and (4) he did so with an intent,

without claim of right, to deprive the owner of his property wholly and permanently. [Citations.]" (*Callan v. Superior Court* (1962) 204 Cal.App.2d 652, 667-668.)

"The felonious intent which supports a burglary charge must usually be inferred from all of the facts and circumstances disclosed by the evidence, rarely being directly provable. [Citations.] 'When the evidence justifies a reasonable inference of felonious intent, the verdict may not be disturbed on appeal.' [Citation.]" (*People v. Reeves* (1981) 123 Cal.App.3d 65, 71, disapproved on another ground in *People v. Sumstine* (1984) 36 Cal.3d 909, 919, fn. 6.)

"It is sufficient that the overt acts reach far enough for the accomplishment of the offense to amount to the '*commencement* of its consummation.' [Citations.] Climbing up on a second story balcony and approaching the doors which led therefrom to the intended victim's bedroom and then making his escape without ever entering the bedroom, was held to be a sufficient act to constitute an attempted burglary in *People v. Gilbert* (1927) 86 Cal.App. 8, and in *People v. Machen* (1935) 3 Cal.App.2d 499, a defendant, who at the time of his arrest had his hands raised up against the screen of an apartment house, was found guilty of attempted burglary, and this conviction was upheld on appeal." (*People v. Vizcarra* (1980) 110 Cal.App.3d 858, 862 (*Vizcarra*).)

C. Analysis

As to counts 3 (attempted robbery of Vargas) and 5 (attempted burglary of Anchorage Liquor Store), defendants contend the evidence was insufficient to satisfy the intent and overt act elements of attempted robbery and attempted burglary. They argue that in contrast with their conduct at C.I. Market, they did not wear masks or gloves, display a gun, or threaten anyone at Anchorage Liquor Store, and that Byrd merely checked to see whether the door was locked while Askew waited in the parking lot.

We find, however, that the facts of this case are similar to those in *Vizcarra*, *supra*, 110 Cal.App.3d 858, in which we upheld an attempted robbery conviction. The defendant in that case walked up to a liquor store with a rifle hidden beneath his poncho. When he saw another customer, he tried to hide by turning to face the wall so "that his

nose was right up against the block wall," but the butt of the rifle was "protruding from his poncho." (*Id*. at p. 862.) After the customer walked by, the defendant returned to his car and drove away. In rejecting the defendant's contention on appeal that the evidence was insufficient to support his conviction of attempted robbery, we stated that "[a]pproaching the liquor store with a rifle and attempting to hide on the pathway immediately adjacent to the liquor store when observed by a customer" was "a sufficient direct act toward the accomplishment of the robbery." (*Ibid*.) We cited *People v. Gilbert*, *supra*, 86 Cal.App. 8, which affirmed the attempted burglary conviction of a defendant who had climbed to a second story balcony, approached the doors to the intended victim's bedroom, and escaped without entering the bedroom. (*Vizcarra*, *supra*, at p. 862.) We also cited *People v. Machen*, *supra*, 3 Cal.App.2d 499, which upheld the attempted burglary conviction of a defendant who was captured while standing with his hands raised against the screen of an apartment house. (*Vizcarra*, *supra*, at p. 862.)

In this case, the evidence reasonably supports a finding that defendant Askew was acting as a lookout while defendant Byrd was knocking on the store door with a loaded gun in his possession in order to commit a robbery. The fact that defendants had run away empty-handed after the first attempted robbery reasonably suggests that they intended to rob and burglarize the second store. Their overt acts—Askew stood in the parking lot to act as a lookout, Byrd went with a loaded gun to knock on the door, Askew alerted Byrd that a patrol car was coming, Byrd turned to look at the patrol car and then left in one direction while Askew left in another—were more than sufficient to constitute an attempted robbery and attempted burglary. (See *Vizcarra*, *supra*, 110 Cal.App.3d at p. 862.)

II. The Section 12022, Subdivision (a) Allegation Was Properly Alleged in the Information and Its Erroneous Omission From the Amended Information Did Not Result in a Denial of Due Process, Notice, or a Fair Trial

Defendants contend for the first time on appeal that the jury's finding that a principal was armed with a firearm (§ 12022, subd. (a)) must be stricken because the

allegation was omitted from the amended information, which violated their rights to due process, notice, and fair trial under the federal and state Constitutions.

A. Additional Facts

The relevant facts are as follows. After the first trial ended in a mistrial, the trial court granted the prosecution's motion to dismiss the conspiracy charge (count 10) and the allegation in counts 3 through 5 that Byrd had personally used a firearm (§ 12022.5, subd. (a)). The prosecutor offered to provide "a cleaner copy of the now amended complaint for court and counsel."

The conspiracy charge and personal firearm use allegation against Byrd were correctly omitted from the amended information. However, the section 12022, subdivision (a) allegation that followed count 10 in the original information was also omitted. Because the section 12022, subdivision (a) allegation was not dismissed, it appears that its omission from the amended information was inadvertent.

There is no indication in the record that the trial court was informed of the omission of the section 12022, subdivision (a) allegation from the amended information. Defendants did not object when the trial court included the section 12022, subdivision (a) allegation in the jury instructions and verdict forms. Defendants did not request a continuance or seek to remove the allegation from the verdict forms. Defendants did not claim they were misled to believe that the allegation had been dismissed. Byrd did not object when he received an enhancement to his sentence based on the allegation.

B. Due Process Notice

Due process requires that notice of the charges be given to afford the accused a reasonable opportunity to prepare and present his or her defense and avoid being taken by surprise at trial. (*People v. Toro* (1989) 47 Cal.3d 966, 975, disapproved on another ground in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.)

The Attorney General argues that notice in this case was proper because defendants were arraigned on the original information that contained the section 12022,

subdivision (a) allegation. Alternatively, the Attorney General contends that defendants forfeited the issue by failing to promptly object when the trial court included the allegation in the jury instructions and verdict forms.

We conclude that defendants received actual notice of the allegation and find there was no violation of their constitutional rights to due process, notice, and fair trial. It is undisputed that defendants were arraigned on the original information that contained the section 12022, subdivision (a) allegation, which was never dismissed. The record fails to indicate that defendants were surprised by the allegation's inclusion in the jury instructions and verdict forms. Defendants did not object to the allegation at any point in the trial court proceedings and have provided no explanation as to what they would have done differently if the allegation had appeared in the amended information.

Because defendants had actual notice of the allegation and never claimed they were misled to believe the allegation was dismissed, the record does not support a lack of notice theory. The omission of the allegation from the amended information was an inadvertent technical error that was rectified by the inclusion of the allegation in the jury instructions and verdict forms. If any confusion or harm was caused to the defense as a result of the allegation's omission from the amended information, we are not aware of it.

Although Byrd concedes he had notice that the firearm enhancement was alleged, he claims the failure of the amended information to include the gun allegation is structural error that requires reversal, citing *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*) and *Gautt v. Lewis* (9th Cir. 2007) 489 F.3d 993.

As demonstrated by the recent Supreme Court case of *People v. Houston* (2012) 54 Cal.4th 1186 (*Houston*), a failure to allege an enhancement in the pleading document is error to which an objection must be lodged. In *Houston*, the defendant was charged with attempted murder; however, the indictment failed to allege that the attempted murder was willful, deliberate, and premeditated. The statute in effect at the time of the defendant's indictment, former section 664, subdivision 1, provided in pertinent part: "The additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was

willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact." (§ 664, former subd. 1, as amended by Stats. 1986, ch. 519, § 2, p. 1859.) After the end of the first day of the defense case, the trial court informed the parties that it understood that the prosecution was intending to charge premeditated attempted murder. The court invited the parties to inform it if the court's understanding was incorrect and stated the punishment for the attempted murder alleged was life imprisonment. There was no response. A week later, the trial court announced its intention to include a special finding on the verdict form with respect to whether the attempted murder was willful, deliberate, and premeditated. After the close of evidence, the court instructed the jury to determine whether the attempted murders were willful, deliberate, and premeditated, submitted the issue to the jury, and sentenced the defendant accordingly after the jury found the allegation true. At no time did the defendant object. The defendant appealed, contending the prosecution failed to comply with the pleading requirements of section 664. The Attorney General conceded the indictment failed to allege that the attempted murders were deliberate and premeditated but argued the defendant had forfeited the claim. The Supreme Court agreed. (*Id.* at p. 1226.)

Citing *Mancebo*, the court stated that "[a] defendant has a due process right to fair notice of the allegations that will be invoked to increase the punishment for his or her crimes." (*Houston*, *supra*, 54 Cal.4th at p. 1227.) The court observed that the trial court expressly informed the defendant that he faced life imprisonment if convicted and "asked the parties to say if there was a problem with the proposed jury instructions and verdict forms." (*Ibid*.) The court concluded that "[h]ad defendant raised a timely objection to the jury instructions and verdict forms at any of these stages of the trial on the ground that the indictment did not allege that the attempted murders were deliberate and premeditated, the court could have heard arguments on whether to permit the prosecutor to amend the indictment. (See § 1009 [trial court may permit amendment of an indictment at any stage of the proceedings].) If the trial court was inclined to permit amendment, defendant could have requested a continuance to permit him to prepare a defense. [Citation.] On the facts here, defendant received adequate notice of the

sentence he faced, and the jury made an express finding that the attempted murders were willful, deliberate, and premeditated. A timely objection to the adequacy of the indictment would have provided an opportunity to craft an appropriate remedy. Because defendant had notice of the sentence he faced and did not raise an objection in the trial court, he has forfeited this claim on appeal." (*Id.* at pp. 1227-1228.)

So it is here. Indeed, the case for finding forfeiture is more compelling in the present case than it was in *Houston.* Here, defendants had actual notice that the charges included an allegation that a principal was armed with a firearm. The discussion on the record made it clear that the prosecution intended only to dismiss count 10, the conspiracy charge. An examination of the information reveals that someone (most likely the trial judge) inadvertently crossed out the principal armed allegation that followed count 10. The person who prepared the amended information eliminated count 10 and the allegation. Nonetheless, neither defendant objected to: (1) the failure of the amended information to include the armed allegation; (2) the jury instruction related to the armed allegation; (3) the submission of the truth of the allegation to the jury; (4) the inclusion of the allegation on the verdict form; or (5) the imposition of sentence for the allegation. The reason trial counsel did not object is clear. They knew their clients faced additional punishment for the firearm allegation. As *Mancebo* stated, defendants were entitled to fair notice of the special allegation. They received it. Byrd's claim of structural error fails. Any other conclusion would exalt form over substance.

Askew argues that his counsel was ineffective in failing to object to the inclusion in the verdict form of the purportedly "uncharged enhancement." Given that the section 12022 allegation was not an "uncharged enhancement" but was alleged in the original information and was never dismissed, counsel had no reason to object on that ground. An objection would have alerted the trial court to the erroneous omission of the allegation from the amended information, but would not have changed the manner in which the case was tried. As a result, Askew was not prejudiced by counsel's failure to object and his claim that he received ineffective assistance fails. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1238.)

III. Askew's Abstract of Judgment Must be Corrected as to Count 4

Askew's request to delete from his abstract of judgment the erroneous reference to count 4, which was dismissed, is well taken. The Attorney General agrees and joins in his request. We therefore direct that Askew's abstract of judgment be corrected accordingly.

IV. The Lack of Presentence Probation Reports Does Not Entitle Defendants to New Sentencing Hearings

Defendants contend that the case must be remanded for resentencing because the trial court did not refer the matter to the probation officer for presentence investigations and reports. We are not persuaded.

Because defendant Askew was statutorily ineligible for probation due to his prior strike conviction, no report was mandated and it was within the trial court's discretion whether to order one. (Cal. Rules of Court, rule 4.411(a)-(b).) We agree with the Attorney General that the trial court did not abuse its discretion by imposing Askew's sentence without ordering a probation report. The parties had informed the trial court of the relevant facts at the hearing on Askew's motion to strike his prior robbery conviction, which was the main sentencing issue.

In any event, Askew is incapable of establishing that he was prejudiced by the absence of a probation report. Given his prior conviction for robbery, his ineligibility for probation, and his commission of the current offenses less than 18 months after his release from prison, there is no reasonable probability that the trial court would have selected the midterm rather than the high-term sentence of three years on count 1. Accordingly, any abuse of discretion in failing to obtain a probation report was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 834-836; *People v. Dobbins* (2005) 127 Cal.App.4th 176, 183.)

Turning to defendant Byrd, we conclude, and the Attorney General concedes, that because he was statutorily eligible for probation, the trial court was required to request a

presentence probation report. (Cal. Rules of Court, rule 4.411(a).) The issue, therefore, is whether the error was harmless.

Byrd contends that because it is impossible to determine what the probation report would have said, there is a reasonable possibility the court might have imposed a more favorable sentence if a report had been prepared. The Attorney General responds that the absence of a probation report was harmless because, given "Byrd's prior felony convictions and prison terms, a probation officer's report would only have served to highlight and emphasize such negative sentencing concerns." There are cases supporting both positions. (See *People v. Mariano* (1983) 144 Cal.App.3d 814, 824-825 ["where a current probation report is required, that right is considered fundamental and its abridgement is generally treated as reversible error"]; but see *People v. Dobbins*, *supra*, 127 Cal.App.4th at p. 182 [the failure to obtain a probation report is harmless if "we must speculate concerning how information in a probation report could have affected the trial court's decision"].)

The trial court's remarks at the sentencing hearing clearly indicate that it viewed Byrd's present offenses to be quite serious because they involved the use of a gun. The trial court gave no hint of any desire to impose a more lenient sentence. On the contrary, the trial court sought to impress upon Byrd the gravity of his situation and the need to change his behavior: "The problem with this case is that there was a gun involved. That makes it for real. You have any number of people killed in robberies, especially liquor stores and markets, in the State of California. Didn't happen in this case. . . . Fortunately for this defendant, he doesn't have a strike to compare him with the other defendant, so far as the sentence is concerned. But now he does have two strikes. I want to have you think about that seriously, Mr. Byrd, totally apart from the years you are going to have to serve in this case. You have two strikes. If you mess up again, Sir, that is a third strike. That's a sentence that you get for first-degree murder even if there is not a murder. Do you understand 25 to life? It's like you're going off for a murder if you get convicted of another felony. It doesn't even have to be a robbery. Doesn't even have to be a crime of violence. You got to really think about what you're doing when you get out."

Under the circumstances of this case, we find there is no reasonable probability that the court would have imposed a more lenient sentence if a presentence probation report had been prepared. We therefore conclude that the failure to obtain a probation report was harmless. (See *People v. Dobbins, supra,* 127 Cal.App.4th at p. 183.)

V. Defendant Byrd Admitted the Prior Conviction Allegations Under Section 667.5, Subdivision (b)

Byrd argues for the first time on appeal that his two 1-year enhancements under section 667.5, subdivision (b) must be reversed because he never admitted and the prosecution never proved that he had served a prior prison term. He states that "[t]he failure to prove that appellant had served any prior prison term, and the failure of the court below to hold any kind of hearing on the issue or to make any formal finding that appellant had served a prison term, require[] reversal of the 667.5 sentence enhancement."

In *People v. Ebner* (1966) 64 Cal.2d 297, the California Supreme Court considered and rejected a similar contention. The defendant argued that the prosecution had "failed to prove elements essential to an adjudication that he was an habitual criminal under Penal Code section 644: namely, that the prior felony convictions of burglary and robbery were separately brought and tried and that defendant served separate prison terms for the crimes." (*Id.* at p. 303.) In rejecting his contention, the Supreme Court stated: "Defendant's admission of the prior convictions is not limited in scope to the fact of the convictions but extends to all allegations concerning the felonies contained in the information. [Citations.]" (*Ibid.*)

Applying *Ebner* to the facts of this case, we conclude that Byrd's contention lacks merit. The information stated in relevant part that "a term was served as described in Penal Code section 667.5" for the offenses of carrying a concealed firearm (§ 12031, subd. (a)(1)) and possession of a firearm by a felon (§ 12021, subd. (a)(1)). According to the reporter's transcript, Byrd admitted the two prior convictions as "alleged on the . . . information." Byrd's attorney concurred with his admissions, stipulated to a factual

basis, and submitted on the records. Based on these facts, we conclude that Byrd's admission of the two prior convictions as "alleged on the . . . information" necessarily encompassed the allegation that he had served two prior prison terms within the meaning of section 667.5, subdivision (b). (*People v. Ebner, supra,* 64 Cal.2d at p. 303.)

VI. Defendants Are Entitled to Additional Presentence Custody Credits

Defendants were arrested on March 31, 2010. Byrd was sentenced on December 20, 2010, and Askew was sentenced the following day. Askew received 304 days of presentence custody credit, consisting of 265 days of actual custody and 39 days of good time/work time. Byrd received 303 days of presentence custody credit, consisting of 264 days of actual custody and 39 days of conduct credit.

In their supplemental opening briefs, defendants contend they each should have received 398 days of presentence custody credit, consisting of 266 days of actual custody and 132 days of conduct credit. The Attorney General agrees that corrections are warranted, but disagrees as to the amount. According to the Attorney General, Askew is entitled to 305 days of custody credit (an increase of one day) and Byrd is entitled to 397 days of custody credit (an increase of 94 days).

In his reply brief, Askew concurs with the Attorney General's calculation. He concedes that as a result of the jury's true finding on the section 12022.5, subdivision (a) allegation, he committed a violent felony under section 667.5, subdivision (c), which triggered the 15 percent conduct credit limitation of section 2933.1, which entitles him to 305 days of presentence custody credit, consisting of 266 days of actual custody and 39 days of conduct credit. We agree and direct that the abstract of judgment be amended accordingly.

As to Byrd, we find that he was in actual custody for 265 days rather than 266 days as stated in his opening brief. Under the January 25, 2010 version of section 4019, subdivision (f) that was in effect on the date of sentencing, Byrd's custody credits "are calculated by dividing the number of actual presentence custody days by four and then multiplying this number by two (one day for good time and one day for work time).

There is no credit given for days remaining after dividing by four." (*People v. Bravo* (1990) 219 Cal.App.3d 729, 731.) Applying that formula, we conclude that Byrd is entitled to 397 days of presentence custody credit, consisting of 265 days of actual custody and 132 days of conduct credit.

Byrd contends that under the equal protection clauses of the state and federal Constitutions, he is entitled to the retroactive application of the October 1, 2011 amendment to section 4019, which would allow him to accrue two days of conduct credit for every two days of actual custody. While his appeal was pending, the California Supreme Court rejected this contention in *People v. Brown* (2012) 54 Cal.4th 314.

DISPOSITION

As discussed in this opinion, defendant Byrd's corrected sentence of six years, eight months consists of: (1) two years on count 1, attempted robbery of Kim (the middle term), plus one year for the principal armed enhancement under section 12022, subdivision (a), plus two 1-year enhancements for his prior prison terms under section 667.5, subdivision (b); (2) eight months on count 3, attempted robbery of Vargas (one-third the middle term of two years), plus four months (one-third of one year) for the principal armed enhancement under section 12022, subdivision (a); and (3) eight months on count 8, carrying a concealed firearm (one-third the middle term of two years). In addition, we impose the middle term of two years on counts 2, 5, and 8, which are stayed under section 654, and we award 397 days of presentence custody credit, consisting of 265 days of actual custody and 132 days of conduct credit.

As discussed in this opinion, defendant Askew's corrected sentence of 23 years consists of: (1) six years on count 1, attempted robbery of Kim (the high base term of three years, doubled to six years as a second strike), plus 10 years for the personal firearm use enhancement under section 12022.53, subdivision (b), plus five years for the serious felony enhancement under section 667, subdivision (b); (2) a consecutive 16 months on count 3, attempted robbery of Vargas (one-third the middle term of two years, doubled to

16 months as a second strike); and (3) a consecutive eight months on count 7, carrying a concealed firearm (one-third the middle term of two years). In addition, we impose the middle term of two years on counts 2, 5, and 6, which are stayed under section 654, and we award 305 days of presentence custody credit, consisting of 266 days of actual custody and 39 days of conduct credit.

As modified, the judgment is affirmed. The clerk of the superior court is directed to prepare a corrected abstract of judgment for each defendant and to forward a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.