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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>VON EARLSAL COWAN,<br><br>Defendant and Appellant. | B285475<br><br>(Los Angeles County Super. Ct. No. VA132673) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Roger Ito, Judge. Affirmed in part, reversed in part, and remanded with directions.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

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Von Earlsal Cowan appeals the judgment following a jury trial in which he was convicted on four counts of kidnapping to commit robbery (Pen. Code,[1] § 209, subd. (b)(1)); two counts of simple kidnapping (§ 207); and 12 counts of robbery (§ 211). The jury further found true with respect to all counts that Cowan personally used a firearm. (§ 12022.53, subd. (b).) Following a motion for a new trial, the trial court reduced the kidnapping convictions on four counts to false imprisonment. (§ 236.) The trial court imposed an aggregate sentence of 540 years to life.

Cowan contends that: (1) the evidence is insufficient to support the remaining two counts of kidnapping to commit robbery; (2) the evidence is insufficient to support the jury's findings that he used a firearm in connection with the offenses; and (3) the sentence must be reversed to permit the trial court to determine whether the enhancements for use of a firearm should be stricken pursuant to the recently amended section 12022.53, subdivision (h). We agree that the evidence cannot support Cowan's conviction for kidnapping to commit robbery on counts 1 and 2. The only movement of the victims was incidental to the robbery itself. Pursuant to section 1181, subdivision 6, we therefore reduce the convictions on counts 1 and 2 to false imprisonment. (§ 236.)

However, we disagree with Cowan's second argument that the evidence was insufficient to support the jury's findings on the firearm enhancements. Witnesses saw Cowan with a gun at each robbery, and Cowan used the gun to intimidate the robbery victims as if it were real.

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[1] Undesignated statutory references are to the Penal Code.

With respect to Cowan's third argument, the Attorney General agrees that the recent amendment to section 12022.53, subdivision (h) applies to this case. Thus, on remand, Cowan must be resentenced and the trial court should exercise its discretion at resentencing to determine if any of the firearm enhancements should be stricken.

## BACKGROUND

### 1. *The Robberies*

#### a. Morales and Sons Wireless on July 3, 2013 (Counts 6 & 7)

Cowan entered the store, asked an employee a question, and later returned. He held a gun in his hand and told the employee that he wanted the money in the register. When the employee did not give him the money, Cowan grabbed her by the hair and threw her on the floor. He put the gun to her head and then to her chest. With the gun against her head Cowan told her not to move or "otherwise he was going to shoot me."

Cowan pulled the employee by the hand to a back room in a warehouse area where telephones were kept for sale. Cowan threw her to the floor and told her not to move, and then shut the door to the back room. Cowan and an accomplice filled some bags with telephones and left.

#### b. Metro PCS in Bellflower on July 22, 2013 (Counts 8 & 9)

Cowan entered the store at around 7 p.m. There was one employee in the store behind a counter. Cowan came around the counter and placed a gun against the employee's stomach. It looked like a "regular handgun."

Cowan asked the employee to get down behind the counter. A customer came in, and Cowan asked for her wallet and purse.

Cowan instructed the customer to get on the ground behind the counter. After walking around the counter, the customer noticed a gun in Cowan's hand. The gun was metal, and dark gray or silver in color.

Cowan and another man took the employee's wallet and cash along with telephones from the store and left. The employee called the police. On the recording of the 911 call played at trial, the customer could be heard in the background stating that the gun was a "black nine," meaning a nine-millimeter gun "[l]ike a police gun."

**c. KJ Electronics on September 13, 2013 (Count 11)**

Cowan came into the store, pointed a gun at an employee, and instructed her to take the money out of the cash register. The gun was black and appeared to be metal. The employee could see down the barrel of the gun, and observed a hole about the width of her finger.

Cowan took the employee by the hair to a back area where telephones were stored. The employee gave Cowan the key to a cage in which telephones were kept, and Cowan made her open it. Cowan and an accomplice left the store with the telephones. The employee hit a "panic alarm" and called the police.

**d. Metro PCS in Los Angeles on September 20, 2013 (Count 12)**

Cowan walked into the store and told an employee to "give him the money." The employee thought he might be joking, so he asked "are you serious?" Cowan pulled up his shirt and revealed the handle of a gun. To the employee, it appeared to be a handgun like the guns that he has seen a police officer carrying. The employee was afraid Cowan would pull out the gun, so she handed him the money. Cowan left the store.

**e. Radio Shack in Encino on October 13, 2013 (Counts 14, 15, 16 & 17)**

Cowan entered the store with a pistol. He told the two employees working there to get down. He was joined by a second person. The two robbers took the employees to the back room where more expensive telephones were kept and told them to lie on the ground. The robbers took merchandise out of a cage where it was kept. The robbers told the employees to go into the bathroom, where the employees waited until the robbers left.

**f. Radio Shack in Pico Rivera on October 27, 2013 (Counts 1, 2, 24 & 25)**

Cowan entered the store and pulled out a gun, which appeared to be a black handgun, probably a semi-automatic pistol. He held it to the back of one of the employees (Christa).[2] Cowan walked behind Christa and the other employee in the store, Lauren, and took them to a back room where they were told to get face down on the floor. Cowan told the employees that he would shoot them if they did not cooperate.

Two other men participated with Cowan in robbing the store. They asked for the keys to a locked cabinet where the telephones were kept. Christa got the keys and unlocked the cabinet. The robbers put the telephones in a bag.

Christa was told to get up and go into the bathroom, which opened into the back room. Christa asked about Lauren, as she

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[2] As discussed below, Cowan challenges the sufficiency of the evidence underlying the aggravated kidnapping convictions relating to this robbery. For clarity, we identify the employees by name, using their first names to protect their privacy. No disrespect is intended.

did not want to go into the bathroom alone. Christa thought she might be raped there. The robbers told Lauren to go into the bathroom also. The robbers instructed them to lock the bathroom door.

The two employees locked the bathroom door from the inside so that "nobody comes in." They waited until they could not hear anything from the robbers. After a few minutes they heard a customer come in and say "hello." At that point they left the bathroom.

**g. Boost Mobile on November 8, 2013 (Counts 3 & 4)**

Cowan came into the store and told an employee to open the register. The employee refused, because he thought Cowan was "playing." Cowan lifted his shirt and the employee saw a gun tucked in Cowan's pants. The employee saw only the handle and the trigger, but he believed it to be a real gun. The employee opened the register and began taking the money out slowly. Cowan told him to hurry up and then grabbed the money.

A manager was watching video surveillance in the back room. He saw Cowan at the counter and heard him tell the employee that the employee was taking too long. The manager went out to see what was happening. Cowan told the manager not to do anything stupid, and showed him the gun. The gun appeared to have a cylinder "[l]ike the cowboys." The manager could see almost the whole gun, and it appeared to be real. Cowan left with the money and said "don't follow me."

**h. Radio Shack in Van Nuys on November 12, 2013 (Counts 19 & 22)**

Cowan entered the store wearing a hoodie and engaged an employee in conversation. A second person came in carrying a bag. Cowan came around behind the register and asked where

the safe was and where the phones were kept. Cowan led the employee to the back room. The employee saw that Cowan had a gun, which Cowan held to the employee's back. The employee was somewhat familiar with handguns, and identified the gun as a "small firearm. Possibly a .9 millimeter. Not a Glock."

When in the back room, Cowan told the employee to kneel down and then lie on the floor. The two men took telephones worth about $50,000.

A customer walked in while Cowan was taking money out of the register. Cowan came over to him, grabbed him by the arm, and said "come with me." Cowan took the customer to the back room while pointing a gun at his head. The gun was a silver metal pistol, with a "rotation for the bullets to go around and around." After taking the customer to the back room, Cowan put him on the ground and said "don't move or I'll kill you."

**2. *Cowan's Case***

Cowan testified. He admitted to participating in the robberies, but testified that he did so because a group of five or six persons threatened to harm his son and his girlfriend if he refused. He testified that the persons who forced him to participate in the robberies had real guns but gave him a "dummy gun." He used the gun as a "pointer," moving it around so that people would know it was fake. He denied pointing it at anyone's face. Cowan testified that he did not know what happened to the fake gun.

Cowan denied forcing anyone into a bathroom. He also denied getting any benefit from the robberies.

**3. *Proceedings Below***

Cowan was charged with 12 counts of second degree robbery (§ 211) and 6 counts of kidnapping to commit robbery.

(§ 209, subd. (b)(1).) He was also charged with enhancements for personal use of a firearm on all counts. (§ 12022.53.)

The jury found Cowan guilty on all the robbery counts. The jury also found Cowan guilty on all the kidnapping counts, but on counts 14 and 16 found only the lesser included offense of simple kidnapping. The jury found all of the firearm enhancements true.

Cowan filed a motion for a new trial, arguing that the evidence was insufficient to support the kidnapping counts. Citing the decision in *People v. Williams* (2017) 7 Cal.App.5th 644 (*Williams*), the trial court granted the motion with respect to four of the kidnapping counts (counts 6, 14, 16, and 22). The court denied the motion with respect to counts 1 and 2 concerning the robbery of the Radio Shack on October 27, 2013. The trial court reduced the offenses on counts 6, 14, 16, and 22 to false imprisonment pursuant to section 1181. Taking into account Cowan's two prior strikes, two prior serious felonies and the firearm enhancements, the trial court sentenced Cowan to consecutive sentences of 45 years to life on 12 counts, and stayed sentence on 6 other counts, for an aggregate sentence of 540 years to life.

## DISCUSSION

### 1. *Standard of Review*

In considering a challenge to the sufficiency of the evidence, an appellate court must " '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.' " (*People v. Avila* (2009) 46 Cal.4th 680, 701, quoting *People v. Lindberg* (2008) 45 Cal.4th 1, 27.) In conducting such a review,

the court " 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " (*Avila,* at p. 701, quoting *People v. Kraft* (2000) 23 Cal.4th 978, 1053.) The same standard of review applies whether direct or circumstantial evidence is involved. (*Avila*, at p. 701.)

**2. *The Evidence Is Insufficient to Support the Convictions for Aggravated Kidnapping on Counts 1 and 2***

Section 209, subdivision (b)(1) provides that "[a]ny person who kidnaps or carries away any individual to commit robbery . . . shall be punished by imprisonment in the state prison for life with the possibility of parole." The offense requires proof that "the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense." (§ 209, subd. (b)(2).)

In *Williams, supra,* 7 Cal.App.5th 644, the court considered convictions under section 209, subdivision (b)(1) based upon a series of robberies that were very similar to those involved in this case. The defendants robbed "Radio Shacks and cell phone stores." (*Id.* at p. 653.) In each of the robberies, the perpetrators moved the employee victims inside the store "from locations closer to the front of the store (and visible from outside) to the rears of the store or to back rooms, where the merchandise and/or cash was kept." (*Id.* at p. 669.) The court concluded that these movements were incidental to the robberies themselves, as the robbers brought the employees to "areas closer to the merchandise they planned to take." (*Ibid.*) The court rejected the argument that moving the employees to the back of the store put them at an increased risk of harm, concluding that the movement simply facilitated the robbery by permitting the robbers to take

merchandise from where it was stored "without detection by customers or other people outside the store." (*Id.* at p. 670.)

The same analysis applies here with respect to counts 1 and 2. The robbers moved the victims to a back stockroom of the Radio Shack, where they ordered one employee to open a locked cabinet containing merchandise. The victims were told to lie face down on the floor. They were then ordered into a bathroom adjoining the back room and instructed to lock the bathroom door from the inside. All of these movements were incidental to the robbery itself.

The Attorney General argues that *Williams* is not good precedent because the court in that case relied on a more stringent judicial standard for aggravated kidnapping that predated a legislative change. In *People v. Daniels* (1969) 71 Cal.2d 1119 (*Daniels*), our Supreme Court explained that the asportation requirement for kidnapping for robbery is not met when the movements of the victim are "merely incidental" to the crime and do not "*substantially increase* the risk of harm over and above that necessarily present in the crime of robbery itself." (*Id.* at p. 1139, italics added.) In *People v. Rayford* (1994) 9 Cal.4th 1 (*Rayford*), the court subsequently reiterated the "substantial increase" requirement in applying the *Daniels* asportation standard to kidnapping for the purpose of various sexual crimes. (*Id.* at p. 22.) In *Williams*, the court cited *Daniels* in stating that aggravated kidnapping must include movement that "substantially" increases the risk of harm to the victim. (*Williams, supra,* 7 Cal.App.5th at pp. 667–668.)

However, in 1997 the Legislature codified the asportation element for aggravated kidnapping by adding subdivision (b)(2) to section 209. That subdivision does not use the term "substantially." (Stats. 1997, ch. 817, § 17.) Our Supreme Court

has not yet considered what, if any, significance to give to this change. (See *People v. Dominguez* (2006) 39 Cal.4th 1141, 1150, fn. 5 [expressing no view on the asportation requirement under § 209, subd. (b)(2)]; *People v. Vines* (2011) 51 Cal.4th 830, 869, fn. 20 (*Vines*) [noting that the prior standard applied at the time of the defendant's crimes].)

We are not persuaded by the Attorney General's criticism of *Williams* based on this legislative change for several reasons. First, the element of a "substantial" increase in the risk of harm was not significant for the court's holding in *Williams*. In summarizing its holding based on the facts in that case, the court did not mention the need for a "substantial" increased risk at all. The court stated simply that the robbers' "objective was robbery, not harm to the store employees, and the record does not contain sufficient evidence that moving the victims to the backs of the stores resulted in an increased risk of harm from the robberies." (*Williams, supra,* 7 Cal.App.5th at p. 670.)

Second, the Attorney General does not cite any authority suggesting that the Legislature's omission of the term "substantially" from its description of the asportation requirement in section 209, subdivision (b)(2) was intended to undermine the holding in *Daniels*. The legislative history suggests that our Legislature intended to codify, not modify, the court's holding. Several committee reports state that the 1997 legislation was intended to "codify" *Rayford* and the "*Daniels* test." (Sen. Rules Com., Analysis of Assem. Bill No. 59 (1997-1998 Reg. Sess.) as amended Sept. 4, 1997, pp. 3–4 (Rules Committee Report); Sen. Com. on Public Safety, Analysis of Assem. Bill No. 59 (1997-1998 Reg. Sess.) as amended June 3, 1997, pp. 3–4.) In *People v. Martinez* (1999) 20 Cal.4th 225, our Supreme Court cited the Rules Committee Report in noting that

section 209, subdivision (b)(2) codifies both *Rayford* and the *Daniels* test, albeit in a modified form without the requirement that the movement " 'substantially' " increase the risk of harm to the victim. (*Martinez,* at p. 232, fn. 4.) As discussed below, the holding in *Daniels* supports the reasoning and the result in *Williams*. (*Williams, supra,* 7 Cal.App.5th at pp. 667–670.)

Third, we agree with the analysis in *Williams* regardless of how the court articulated the controlling standard. The court relied on sound logic and precedent in concluding that the robbers' movement of employee victims within the store to facilitate access to valuables was incidental to the robbery itself. (*Williams, supra,* 7 Cal.App.5th at pp. 669–670.)

In *Daniels,* the court held that the "brief movements" that the defendant required the victims to perform were incidental to the robberies and rapes that the defendant committed. (*Daniels, supra,* 71 Cal.2d at p. 1140.) The defendant moved some of the victims short distances within their houses, and moved another victim a short distance to her car. The court concluded that, "when in the course of a robbery a defendant does no more than move his victim around inside the premises in which he finds him—whether it be a residence, as here, or a place of business or other enclosure—his conduct generally will not be deemed to constitute the offense proscribed by section 209." (*Id.* at p. 1140.) (See also *People v. Hoard* (2002) 103 Cal.App.4th 599, 603 (*Hoard*) [moving victims to the back office of a jewelry store and confining them there was incidental to robbery of the store]; *People v. Washington* (2005) 127 Cal.App.4th 290, 300 [movement of bank employees to vault room to obtain money from the vault was incidental to bank robbery].)

These precedents support the conclusion that the movement involved in this case did not meet the asportation

element of section 209, subdivision (b)(2). The two victims were moved within the same building to an area containing the merchandise that the perpetrators intended to steal. The movement was incidental to the robbery itself.

The Attorney General argues that the additional "gratuitous" movement of the victims into the bathroom distinguishes this case from *Williams* and *Hoard*. But the evidence does not support a reasonable conclusion that moving the victims into the bathroom in this case caused any increased risk of harm to them.

Critically, both victims testified that the robbers instructed them to lock the bathroom door from the *inside*. Locking the robbers out logically caused the victims to be more, not less, safe. Christa testified that they locked the door "so nobody comes in." While Christa also testified that she was more afraid while she was in the bathroom, the reasons for her fear that she identified (such as the number of robbers and their use of a gun) had more to do with the inherently frightening experience of the robbery itself than with the movement to behind a locked door in the bathroom.[3] (See *Hoard, supra,* 103 Cal.App.4th at p. 607 ["the victims may have been at less risk tied up in the back office where they could not try to thwart the robbery than had they remained at gunpoint in the front of the store"].)

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[3] The Attorney General cites Christa's testimony that she was afraid the robbers might rape her in the bathroom. But she testified that she had that fear when she thought she might be forced into the bathroom by herself, not when she was together with Lauren in the bathroom behind a locked door.

The Attorney General argues that the victims were less safe in the bathroom because they could not hear or see what was happening and they might have tried to escape before the robbers had left. But the victims were able to listen through the bathroom door once they turned the bathroom fan off, and they did not leave the room until they heard a customer's voice in the store. On this record, the argument that the victims might have tried to escape while the crime was still in progress does not rise above speculation.[4]

Once the victims were in the bathroom, they did not see the robbers again. The robbers did not use the victims' confinement in the bathroom to interrogate, threaten, or assault them or to commit any other crimes. The only reasonable conclusion from the evidence is that, as in *Williams,* the robbers' objective was "robbery, not harm to the store employees." (*Williams, supra,* 7 Cal.App.5th at p. 670.) The record therefore does not contain sufficient evidence that the movement into the bathroom resulted in an increased risk of harm to the victims. (§ 209, subd. (b)(2).)

Basing a kidnapping conviction on the robbers' decision to place the victims into a separate room behind a locked door while they completed their crime would have the perverse effect of penalizing conduct that removed the victims from the scene of the

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[4] The facts here are very different from the facts in *Vines*, *supra*, 51 Cal.4th 830. In that case, the victims were forced down a stairway that was hidden from view into a freezer where the temperature was about 20 degrees Fahrenheit. Such an environment was not only inherently more dangerous, but it increased the foreseeable risk of an escape attempt. (*Id.* at p. 871.)

crime and actually made them safer. While we do not wish to minimize the victims' trauma of being confined against their will while the armed robbers committed their theft, the legal question at issue is whether their movement into the bathroom increased their risk from the robbery. On this record, we conclude that such a finding is unreasonable. The trial court therefore should have reduced the aggravated kidnapping convictions on counts 1 and 2 to false imprisonment as it did on the other kidnapping counts.

**3. *The Evidence Supports the Firearm Enhancements on Each Count***

In contrast to the evidence concerning the aggravated kidnapping convictions on counts 1 and 2, the evidence concerning the firearms enhancements is sufficient to support the jury's findings. As summarized above, witnesses at each robbery testified that Cowan used a gun to compel compliance.

Cowan acknowledges that the witnesses "saw what they claimed appeared to be a real gun," but argues that "none of them provided conclusive evidence that it was, in fact an actual firearm." But "conclusive" evidence is not necessary. We must uphold the jury's verdict if the record contains *substantial* evidence supporting conviction, that is, "evidence which is reasonable, credible, and of solid value." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

Here, there was testimony that witnesses saw Cowan in possession of what appeared to be a gun. That testimony was supported by circumstantial evidence that Cowan used the object as if it were a gun to intimidate the victims. That evidence was sufficient to support the jury's finding, even if the witnesses had no particular knowledge of firearms and could not rule out the possibility that the gun was not real.

In *People v. Monjaras* (2008) 164 Cal.App.4th 1432 (*Monjaras*), the court held that, when "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." (*Id.* at p. 1437.)

That holding is sound. A contrary rule would place an unreasonably high burden on the prosecution to prove the use of a firearm. As the court explained in *Monjaras,* few victims have the "composure and opportunity" to examine weapons carefully during a crime and in any event often lack the expertise to know whether a firearm is real or an imitation. (*Monjaras, supra,* 164 Cal.App.4th at p. 1436.) Because the guns used in robberies are often not recovered (*ibid.*), requiring "conclusive" evidence that a firearm was real would preclude proof that a firearm was used in most cases where no shots were actually fired.

Moreover, the jury here was entitled to consider evidence of Cowan's own threatening statements and behavior. That conduct amounted to an admission that the gun was real by using it to intimidate the victims. (See *People v. Rodriguez* (1999) 20 Cal.4th 1, 12–13 [evidence of a defendant's statements and conduct in connection with his use of a gun could support a finding that the gun was loaded].)

The conclusion that the evidence supports the jury's findings is not undermined by Cowan's testimony or by evidence that deputies found an air pistol pellet gun at the residence where Cowan was living. The jury was not required to believe

Cowan's testimony. Nor was it required to conclude that Cowan used a pellet gun rather than a firearm for the robberies simply because Cowan owned a pellet gun, especially in light of Cowan's own testimony that he obtained the fake gun that he used in the robberies from another source.[5]

**4. *On Resentencing the Trial Court Must Consider Whether the Firearm Enhancements Should Be Stricken***

Our conclusion that the convictions on counts 1 and 2 must be reversed requires resentencing. The Attorney General also agrees that resentencing is necessary to permit the trial court to consider whether the firearm enhancements should be stricken as authorized by recent legislation.

Effective January 1, 2018, section 12022.53, subdivision (h) was amended to read: "The court may, in the interest of justice

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[5] The victim of the robbery at KJ Electronics testified that a picture of the air pistol looked more similar to the gun Cowan used in the robbery than a picture of the nine-millimeter handgun. However, due to the passage of time she could not say whether either of those items was the gun that Cowan actually used. In addition, she recalled that, during the robbery, she could see down the barrel of the gun and observed a hole about the width of her finger. A sheriff deputy testified that the air pistol has a smaller barrel than the nine-millimeter pistol, because the air pistol barrel "has to be the same size" as the BB or pellet that it shoots. The victim also testified that she thought the gun was real during the robbery when Cowan pointed it at her. Under the deferential standard of review that we employ in reviewing the jury's findings, this evidence is sufficient to support the firearm enhancement on count 11.

pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2.) That amendment is applied retroactively to all cases that were not final at the time it became effective. (*People v. Chavez* (2018) 22 Cal.App.5th 663, 708–712; *People v. Arredondo* (2018) 21 Cal.App.5th 493, 506–507.)

The Attorney General agrees that the new legislation applies to this case. Accordingly, upon resentencing the trial court must exercise its discretion to determine whether any of the firearm enhancements should be stricken pursuant to section 12022.53, subdivision (h).

**DISPOSITION**

The judgment is reversed. Pursuant to section 1181, subdivision 6, Cowan's convictions on counts 1 and 2 are ordered reduced to convictions for false imprisonment in violation of sections 236 and 237, subdivision (a). In all other respects the jury's verdict is affirmed. The case is remanded for resentencing, at which time the trial court shall exercise its discretion in determining whether to strike any of the firearm enhancements pursuant to section 12022.53, subdivision (h).

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.