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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

LEQWONE Q. RUSSELL et al.,

Defendants and Appellants.

B276650

(Los Angeles County
Super. Ct. No. MA066161)

APPEALS from judgments of the Superior Court of Los Angeles County, Andrew E. Cooper, Judge. Judgment affirmed for Leqwone Q. Russell. Conviction affirmed; remanded for resentencing for Anthony Meru Blue.

Stephen Temko, under appointment by the Court of Appeal, for Defendant and Appellant Leqwone Q. Russell.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant Anthony Meru Blue.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant

Attorney General, Susan Sullivan Pithey and Alene M. Games,
Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Leqwone Q. Russell and Anthony Meru Blue walked into a gas station convenience store at 2:20 in the morning and robbed the store. Both defendants were convicted after a jury trial. Russell and Blue argue the evidence was insufficient to support their convictions for kidnapping to commit robbery. Blue also seeks resentencing in light of the recent passage of Senate Bill No. 620, which provides the trial court with discretion to impose or strike the firearm enhancement.

Because the record contains substantial evidence from which a reasonable jury could find the scope and nature of the clerk's movement throughout the convenience store was more than incidental to the robbery and increased his risk of harm, we affirm the convictions for kidnapping to commit robbery. We agree Blue is entitled to the benefit of Senate Bill No. 620 and remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

Both Russell and Blue were charged with kidnapping to commit robbery (Pen. Code,¹ § 209, subd. (b)(1); count 1) and second degree robbery (§ 211; count 2). As to both counts, it was alleged a principal (Blue) was personally armed with a handgun (§ 12022.53, subds. (b), (e)(1)) and, though Russell was not personally armed, he knew that Blue was armed (§ 12022, subd. (d)).

In addition, Blue was charged with possession of a firearm by a felon (§ 29800, subd. (a)(1); count 3), assault with a firearm (§ 245, subd. (a)(2); count 5) and making criminal threats (§ 422, subd. (a); count 6).² As to count 5, it was alleged that Blue personally used a handgun. (§ 12022.5, subd. (a).) It was further alleged Blue had a prior serious and/or violent felony conviction (carjacking) within the meaning of sections 667, subdivision (a)(1), and was subject to the three strikes law (§§ 667, subds. (b)-(j), 1170.12), and served a prior prison term (§ 667.5).

B. *The Kidnapping and Robbery Evidence at Trial*

On January 29, 2015, at around 2:20 a.m., Kristopher Giles was working as the cashier in a gas station convenience store

¹ All statutory references are to the Penal Code.

² Counts 4 and 7 were not charged in the information. Count 8 (conspiracy, § 182) was dismissed on the People's motion (§ 1385).

located in Lancaster. He was speaking with a customer when he saw Blue enter the store. Once the customer left, Blue approached the cash register, pulled out a gun and ordered Giles to put the money in a bag. Scared for his life, Giles told Blue he “had a kid,” even though it was not true, because he thought being a father might convince Blue not to shoot him. While emptying the register, Giles saw Russell walk in and grab items from the store shelves.³ Giles gave Blue all the money from the register, which totaled around \$40.⁴ Blue ordered Giles to give him the money from the safe, but Giles explained it was a floor safe, drilled into the ground, and he did not have access to it. Blue accused Giles of lying. Gun in hand, Blue repeatedly demanded the money, and Giles repeatedly said he could not retrieve the money.

Blue walked Giles at gunpoint to the office in the back of the store. Blue searched for more money, but did not find any. Blue told Giles to get on his knees. Giles pleaded for his life. If Giles were lying about the money, Blue said he would come back to “get” him. As Giles stood up, Blue hit him in the head with the gun barrel.⁵

³ Several surveillance cameras recorded the robbery. The jury watched portions of the video surveillance tapes throughout Giles’s testimony.

⁴ According to the store’s policy, during the night shift the cashier was not to keep more than \$40 in the register.

⁵ There were no surveillance cameras inside the office, so what transpired in the office was not recorded. Cameras did record Blue and Giles (and Russell) going into and out of the office/storage room.

Blue forced Giles to return to the front of the store where, at both defendants' direction, Giles put certain cigarettes (Newport Menthol), cigars (Swishers) and Scratchers (Lotto tickets) into a bag. Blue handed the bag to Russell, and the two were about to walk out of the store when Blue noticed a camera. Russell left, but Blue stayed behind to inquire about the surveillance cameras. Giles explained the cameras were operated from the storage room next to the back office. Blue ordered Giles across the store and told him to turn off the cameras. When they reached the back office, Giles showed Blue the surveillance equipment and explained he could not deactivate the cameras or erase the footage. Blue was nervous, aggressive and angry with Giles. Blue demanded to know the truth. He waived the gun about and pointed it directly at Giles. Finally, Blue told Giles to give him ten minutes before calling the police and left the store.⁶

Neither Russell nor Blue presented any evidence at trial.⁷

⁶ Giles called 911, and the defendants were arrested a short time later.

⁷ Both defendants moved to dismiss the aggravated kidnapping charges at the close of the prosecution's case pursuant to section 1118.1 on the ground the prosecution failed to meet its burden of proof on the asportation element of kidnapping for robbery. The trial court denied the motions. After the jury reached its verdicts, Blue moved for a new trial (§ 1181) on count 1, arguing again that the evidence of asportation was insufficient. The trial court denied the motion.

C. *The Verdict and Sentencing*

The jury found Russell guilty of kidnapping to commit robbery and robbery, and found true the allegation Russell knew a principal was armed within the meaning of section 12022, subdivision (d). The court sentenced Russell to a term of life imprisonment with the possibility of parole, with a minimum period of confinement of seven years, on the aggravated kidnapping count (§§ 209, subd. (b)(1), 3046, subd. (a)(1)); an additional one-year term for the section 12022, subdivision (a)(1) enhancement, which was stayed pursuant to section 654; and the upper term of five years on the robbery count (§ 211), which was also stayed pursuant to section 654.

The jury found Blue guilty of kidnapping for robbery, robbery, and possession of a firearm by a felon. The jury found true the allegation that he personally used a handgun within the meaning of section 12022.53, subdivision (b). Blue was acquitted of assault and making criminal threats. After admitting his prior conviction, the court sentenced Blue to a total effective sentence of 29 years to life, calculated as follows: on the aggravated robbery count (§ 209, subd. (b)(1); count 1), life imprisonment with the possibility of parole, with a minimum period of confinement of seven years (§ 3046, subd. (a)(1)), doubled under the three strikes law (§§ 667, subds. (b)-(j), 1170.12) to life imprisonment with the possibility of parole and a minimum period of confinement of 14 years, plus an additional 10 years for the personal use enhancement (§ 12022.53, subd. (b)), plus another five years pursuant to section 667, subdivision (a)(1). On the robbery count (§ 211; count 2), the trial court sentenced Blue to the upper term of five years, doubled pursuant to the three strikes law to 10 years, but stayed the imposition of sentence

pursuant to section 654. The court sentenced Blue to the upper term of three years on count 3 (§ 29800), doubled pursuant to the three strikes law to six years, but stayed the imposition of sentence on this count as well (§ 654).

DISCUSSION

A. *Standard of Review*

In reviewing a challenge to the sufficiency of the evidence, we examine the record in the light most favorable to the judgment (*People v. Nelson* (2011) 51 Cal.4th 198, 210), and “determine whether the record contains substantial evidence—[meaning] evidence that is reasonable, credible, and of solid value—from which a reasonable jury could find the accused guilty beyond a reasonable doubt.’ [Citations.]” (*People v. Vines* (2011) 51 Cal.4th 830, 869 (*Vines*).) “In applying this test, we . . . presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ‘. . . We resolve neither credibility issues nor evidentiary conflicts. . . . [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict. [Citation.]’” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; accord, *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Applying this standard, we find the

asportation evidence sufficient to support the convictions for aggravated kidnapping.⁸

B. *Legal Principles of Kidnapping To Commit Robbery*

Section 209, subdivision (b)(1), provides that “[a]ny person who kidnaps or carries away any individual to commit robbery, rape [or other specified crime] . . . shall be punished by imprisonment in the state prison for life with the possibility of parole.” “[A]ggravated kidnapping is committed *only* ‘if the movement of the victim is [(1)] beyond that merely incidental to the commission of, and [(2)] increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense.’ (§ 209, subd. (b)(2).)”⁹ (*People v. Simmons*

⁸ Kidnapping for robbery is commonly referred to as aggravated kidnapping. (*People v. Nguyen* (2000) 22 Cal.4th 872, 874 [kidnapping for the purpose of robbery under § 209, subd. (b), is “otherwise known as aggravated kidnapping”]; *People v. Rayford* (1994) 9 Cal.4th 1, 11 [§ 207, subd. (a), defines simple kidnapping while § 209, subd. (b), defines “kidnapping for robbery, or aggravated kidnapping”].)

⁹ Until 1997, under *People v. Daniels* (1969) 71 Cal.2d 1119, 1139, “kidnapping for robbery, or aggravated kidnapping, required movement of the victim that (1) was not merely incidental to the commission of the robbery, and (2) *substantially* increased the risk of harm over and above that necessarily present in the crime of robbery itself.” (*Vines, supra*, 51 Cal.4th at p. 869, italics added.) In 1997, however, the Legislature “modified the asportation standard by eliminating the requirement that the movement of the victim ‘substantially’ increase the risk of harm to the victim.” (*Id.* at p. 869, fn. 20; *People v. Robertson* (2012) 208 Cal.App.4th 965, 978, 982

(2015) 233 Cal.App.4th 1458, 1471; *People v. Delgado* (2013) 56 Cal.4th 480, 487 [“Kidnapping for robbery requires asportation, i.e., movement of the victim that is not merely incidental to the commission of the robbery and that increases the risk of harm over that necessarily present in the crime of robbery itself”]; *Vines, supra*, 51 Cal.4th at p. 869 & fn. 20 [aggravated kidnapping requires “movement of the victim that (1) was not merely incidental to the commission of the robbery, and (2) . . . increase[s] the risk of harm over and above that necessarily present in the crime of robbery itself”].)

With respect to the first element (whether the movement was more than merely incidental to the commission of the intended crime), “the jury considers the ‘scope and nature’ of the movement, which includes the actual distance a victim is moved. [Citations.] There is, however, no minimum distance a defendant must move a victim to satisfy” this element. (*Vines, supra*, 51 Cal.4th at p. 870.) “‘Incidental’ means ‘that the asportation play no significant or substantial part in the planned [offense], or that it be a more or less “trivial change[] of location having no bearing on the evil at hand.”’ [Citation.]” (*People v. James* (2007) 148 Cal.App.4th 446, 454.) “[T]he fact that the movement of a robbery victim *facilitates* a robbery does not imply that the movement was merely incidental to it.” (*Ibid.*) “[W]hat matters is the scope and nature of the movement.” (*Id.* at p. 457.)

For the second element (whether the movement increased a victim’s risk of harm), the jury considers ““such factors as the

[“[§] 209, [subd.] (b)(2) does *not* require the People to prove that the movement *substantially* increased the risk of harm”].)

decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes. [Citations.] The fact that these dangers do not in fact materialize does not, of course, mean that the risk of harm was not increased.” [Citation.]” (*Vines, supra*, 51 Cal.4th at p. 870; accord, *People v. Dominguez* (2006) 39 Cal.4th 1141, 1152.) The increased risk of harm may be physical or psychological in nature. (*People v. Nguyen, supra*, 22 Cal.4th at pp. 885-886 [“substantial movement of a victim, by force or fear, which poses a substantial increase in the risk of psychological trauma to the victim beyond that to be expected from a stationary robbery, seems an entirely legitimate basis for finding a separate offense. To conclude the word ‘harm,’ as used in [§] 209, [subd.] (b), includes psychological harm is thus reasonable”].)

These two elements “are not mutually exclusive, but interrelated.” [Citation.]” (*People v. Dominguez, supra*, 39 Cal.4th at p. 1152.) Whether the victim's forced movement was merely incidental to the robbery is “necessarily connected” to whether it increased the risk of harm. (*Ibid.* [“[t]his standard suggests a multifaceted, qualitative evaluation rather than a simple quantitative assessment”].) Ultimately, “[t]he essence of aggravated kidnapping is the increase in the risk of harm to the victim caused by the forced movement.” (*Ibid.*) In measuring this risk, “each case must be considered in the context of the totality of its circumstances.” (*Ibid.*)

C. *Substantial Evidence Supports the Kidnapping To Commit Robbery Convictions*

Defendants contend the evidence is insufficient to support their convictions for kidnapping to commit robbery.¹⁰ More particularly, they argue Blue's movement of Giles to the back rooms of the store on both occasions was merely incidental to the robbery and did not increase the risk of harm to Giles. Defendants argue the facts in this case are "closely analogous" to those in *People v. Washington* (2005) 127 Cal.App.4th 290 (*Washington*), *People v. Williams* (2017) 7 Cal.App.5th 644 (*Williams*), and *People v. Hoard* (2002) 103 Cal.App.4th 599 (*Hoard*), three cases in which the kidnapping to commit robbery convictions were reversed.

In *Washington*, the defendants ordered the bank manager and a teller to walk from their work stations with their keys to the vault. (*Washington, supra*, 127 Cal.App.4th at pp. 295-296.) Once the vault was open, the defendants took the cash inside and left. (*Ibid.*) Each victim moved the shortest distance between their original locations and the vault so "there was no excess or gratuitous movement of the victims over and above that necessary to obtain the money in the vault," and because opening the vault required two sets of keys from two different employees, "the movement of both [the manager] and [the teller] was necessary to complete the robbery." (*Id.* at p. 299.) "On these facts," the *Washington* court stated, "it must be concluded the

¹⁰ While Blue and Russell filed separate appeals, they both raise the same issue (sufficiency of the evidence to sustain a conviction for aggravated kidnapping) and join in each other's arguments. (Cal. Rules of Court, rule 8.200(a)(5).)

brief movement of [teller and manager] to the bank's vault room was incidental to the robbery" and therefore insufficient to support an aggravated robbery conviction. (*Id.* at p. 299.) Surveying several other aggravated robbery cases, the *Washington* court observed that "[t]he rule to be derived from these cases is that robbery of a business owner or employee includes the risk of movement of the victim to the location of the valuables owned by the business that are held on the business premises." (*Id.* at p. 300.)

In *Williams*, *supra*, 7 Cal.App.5th 644, "[t]he robbers entered the stores through the front doors and moved the employee victims to areas closer to the merchandise they planned to take." (*Id.* at p. 669.) The court found that "[n]one of the movements was unnecessary to the robbery." (*Ibid.*) Quoting the "rule" from *Washington*, *supra*, 127 Cal.App.4th at page 300, the *Williams* court found the defendants' movements incidental to each of the robberies and reversed their convictions. (*Williams*, at p. 669.)

Finally, in *Hoard*, *supra*, 103 Cal.App.4th 599, the defendant entered a jewelry store, displayed a gun and forced two employees to walk 50 feet to a back room where he bound the victims' wrists, ankles and mouths with duct tape, then returned alone to the display cases at the front. (*Id.* at pp. 602, 607.) After gathering the jewelry, he returned to the back, threatened the victims and pulled the office phone out of the wall and left. (*Id.* at p. 602.) The *Hoard* court reversed the defendant's aggravated kidnapping convictions, concluding the forced movement of the victims was merely incidental to the robbery because it served only to facilitate the crime (providing free access to the jewelry

and concealing the robbery from the public) with no other apparent purpose.¹¹ (*Id.* at p. 607.)

The facts in this case are readily distinguishable from the foregoing cases. Unlike the defendants in *Washington*, *Williams* and *Hoard*, Blue forcibly moved Giles *after* the purpose of the robbery had been achieved. With the stolen money and merchandise in hand, Blue and Russell were about to leave the store when Blue saw the cameras. The robbery completed, Russell left the store. Blue, however, stayed behind and ordered Giles across the store to dismantle the surveillance equipment. As Blue and Russell concede, the second forced movement was for the “express purpose” of dismantling or disconnecting the store’s surveillance camera equipment, “to avoid detection as . . . the robbers.” Forcing Giles to the back of the store a second time was in excess of that necessary to commit the robbery. (*People v. Leavel* (2012) 203 Cal.App.4th 823, 835, 836 [“even if [the defendant’s] forcible move of [the victim] to the bedroom was in furtherance of the robbery, the jury could find his forcible move of her from the bedroom to the kitchen and other locations was

¹¹ Several courts have criticized *Hoard*’s reasoning that “necessary movement is incidental movement” (*Hoard, supra*, 103 Cal.App.4th at p. 605). (See, e.g., *People v. James, supra*, 148 Cal.App.4th at p. 455 & fn. 8 [to conclude that “a movement which was necessary to, and facilitative of, a robbery must necessarily have been merely incidental to it” is “logically erroneous and legally unsound”; finding that “movement necessary to a robbery may or may not be merely incidental to it”]; *People v. Aguilar* (2004) 120 Cal.App.4th 1044, 1047, 1051, 1052 [noting “*Hoard* is at odds with other cases” and “inconsistent” with California Supreme Court authority].)

not”]; *People v. James*, *supra*, 148 Cal.App.4th at p. 455 [“Lack of necessity is a sufficient basis to conclude a movement is not merely incidental”].)

Movement that is unnecessary and gratuitous is not incidental to the robbery. A case on point is *People v. Corcoran* (2006) 143 Cal.App.4th 272. In *Corcoran*, the defendants intended to rob a bingo hall where five people were working, but one employee escaped and called for help. The defendants aborted the robbery and moved the remaining four victims 10 feet into an office at the back of the bingo hall with no windows and a solid door. (*Id.* at pp. 276, 279.) The *Corcoran* court distinguished *Washington* because, in that case, “there was no excess or gratuitous movement of the victims over and above that necessary to obtain the money in the vault.” (*Id.*, at p. 279, quoting *Washington*, *supra*, 127 Cal.App.4th at p. 299.) The court also distinguished *Hoard* because, in that case, forcing two jewelry store employees to the back of the store gave the defendant free access to the jewelry. (*Corcoran*, at p. 280, citing *Hoard*, *supra*, 103 Cal.App.4th at p. 607.) In *Corcoran*, however, “the movement of the victims had nothing to do with facilitating taking cash from the bingo hall; [the] defendant and his accomplice had aborted that aim, and their seclusion of the victims in the back office under threat of death was clearly ‘excess and gratuitous.’” (*Corcoran*, at pp. 279-280.)

Blue’s forced movement of Giles to investigate the surveillance video equipment was similarly “excess[ive] and gratuitous” because the purpose of the robbery (taking the available cash and merchandise) had been achieved. Accordingly, as to the first element, there was sufficient evidence from which a

reasonable jury could find Giles' movement was more than merely incidental to the commission of the crime.

Turning to the second element (increased risk of harm), the evidence was similarly sufficient to support the jury's verdict. The front of the store was all glass, and customers continued to enter the store during the robbery.¹² By taking Giles to the back room, Blue moved him out of plain sight, thereby decreasing his chances of being caught. (See *People v. Leavel*, *supra*, 203 Cal.App.4th at p. 836 [forcing the victim back inside her house after taking her outside "decreased the possibility of detection, escape or rescue, and enhanced his opportunity to commit additional crimes against her"]; *People v. Corcoran*, *supra*, 143 Cal.App.4th at p. 280 ["no purpose for moving the victims to the back office *except to* facilitate" removing victims from plain view, decreasing odds of detection, increasing risk of harm to the victims and facilitating the robbers' escape].)

By moving Giles to the back of the store and out of sight, Blue also substantially increased Giles's risk of being harmed. Indeed, in this back room, Blue ordered Giles to his knees, threatened to kill him and pistol whipped him. (See *People v. Dominguez*, *supra*, 39 Cal.4th at p. 1152 [risk factors include whether movement "enhances the attacker's opportunity to commit additional crimes"]; *People v. Lara* (1974) 12 Cal.3d 903, 908 [the defendant substantially increases the victim's risk of harm when "the victim is forced to travel a substantial distance

¹² During the robbery, two people came into the convenience store and left without incident: a female security guard from another business and a man in a vest, who used the bathroom.

under threat the of imminent injury by a deadly weapon”]; *People v. Jones* (1999) 75 Cal.App.4th 616, 629-630 [forcing the victim across the parking lot to her car after taking her wallet and keys increased her risk of harm].) When Blue ordered Giles through the store the second time, the risk of harm increased further. Unlike *Hoard*, where “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” (*Hoard, supra*, 103 Cal.App.4th at p. 607), in the present case Blue continued to use the gun to threaten Giles as he forced him to move to the back of the store a second time. Blue had already “demonstrated [a] willingness to be violent” by striking Giles with a gun minutes earlier. (*People v. Jones, supra*, 75 Cal.App.4th at p. 630 [“An increased risk of harm was manifested by [the] appellant’s demonstrated willingness to be violent”]; see *People v. James, supra*, 148 Cal.App.4th at p. 458 [“a kidnap victim’s peril ordinarily grows with the passage of time and distance”].) Positioned in the back office again, Blue accused Giles of lying about the surveillance system, and demonstrated his anger and frustration by threatening Giles further with the gun. Given that during his first trip to the storage room, Giles was threatened and pistol whipped, this second forced movement to the back of the store carried with it not only the increased risk of physical harm, but also the increased risk of psychological injury. (See *People v. Nguyen, supra*, 22 Cal.4th at p. 886 [finding that the “increase in the risk of psychological trauma to the victim beyond that to be expected from a stationary robbery” can satisfy the asportation requirement].)

“Considering the totality of the circumstances and . . . viewing the evidence in the light most favorable to the People”

(*People v. Corcoran*, *supra*, 143 Cal.App.4th at p. 280), substantial evidence supports the jury's determination that Blue's forced movement of Giles across the store was more than incidental to the robbery and increased Giles's risk of harm.

D. *Blue Is Entitled to Resentencing on the Gun Enhancement*

At Blue's sentencing, the court imposed a consecutive 10-year firearm enhancement pursuant to section 12022.53, subdivision (b). At the time of the sentencing, the enhancement was mandatory and could not be stricken in the interest of justice. (See former § 12022.53, subd. (h), Stats. 2010, ch. 711, § 5; *People v. Felix* (2003) 108 Cal.App.4th 994, 999.)

On October 11, 2017, the Governor signed Senate Bill No. 620, which as relevant here, amends section 12022.53 to provide the trial court with the discretion to strike, in the interest of justice, a firearm enhancement allegation found to be true under that statute.¹³ Effective January 1, 2018, section 12022.53, subdivision (h), is amended to state: "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 this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."¹⁴ (Stats. 2017, ch. 682, § 2(h).)

¹³ Similarly, the bill also amends section 12022.5, subdivision (c), to give the trial court the authority to strike a firearm enhancement when a true finding is made under section 12022.5.

¹⁴ "Under the California Constitution, a statute enacted at a regular session of the Legislature generally becomes effective on

Based upon the passage of Senate Bill No. 620, Blue seeks resentencing on the gun enhancement. Blue argues, citing *In re Estrada* (1965) 63 Cal.2d 740, 746, that the amendment to section 12022.53 applies because his case will not be final when the new statutes become effective on January 1, 2018. Under *Estrada*, courts presume that absent evidence to the contrary, the Legislature intends an amendment reducing punishment under a criminal statute to apply retroactively to cases not yet final on appeal. (*In re Estrada*, at pp. 747-748; *People v. Brown* (2012) 54 Cal.4th 314, 324 [*Estrada* is properly understood in a specific context: “articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments”].) The *Estrada* rule has been applied not only to amendments reducing the penalty for a particular offense, but also to amendments giving the court the discretion to impose a lesser penalty. (*People v. Francis* (1969) 71 Cal.2d 66, 76.)

The People concede that after January 1, 2018, Senate Bill No. 620 will apply to Blue’s case. Nonetheless, citing *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896, the People argue remand is not appropriate because “the record shows that the trial court ‘would not . . . have exercised its discretion to lessen the sentence.’” In support of their argument, the People make the following points: Blue’s criminal record includes a “strike” as well as a domestic violence conviction; Blue was sentenced to the

January 1 of the year following its enactment except where the statute is passed as an urgency measure and becomes effective sooner.” (*People v. Henderson* (1980) 107 Cal.App.3d 475, 488; see Cal. Const., art. IV, § 8, subd. (c)(1).)

upper terms on counts 2 and 3; Blue was on probation at the time he committed the offenses; and the court imposed a consecutive one-year, eight-month term for the violation.

“Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to ‘sentencing decisions made in the exercise of the “informed discretion” of the sentencing court,’ and a court that is unaware of its discretionary authority cannot exercise its informed discretion.” (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228; accord, *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 [“A court which is unaware of the scope of its discretionary powers can no more exercise that “informed discretion” than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record”].) In such cases, the matter must be remanded to allow the trial court to properly exercise its discretion unless doing so would be an “idle act” because “the record shows the trial court would not have exercised its discretion even if it believed it could do so” (*People v. Gamble* (2008) 164 Cal.App.4th 891, 901.)

In the present case, the record does not demonstrate that remand to the trial court would be an “idle act.” While the trial court identified several aggravating factors warranting imposition of the upper end of the base term for counts 2 and 3, the court’s comments do not compel the conclusion the court would have imposed the additional 10 years for the firearm

enhancement on count 1 if it had the discretion not to do so.¹⁵ (See *People v. Deloza* (1998) 18 Cal.4th 585, 599-600 [case remanded for resentencing where court understood its discretion to strike a prior conviction under the three strikes law and declined to do so, but did not understand it had discretion to impose concurrent rather than consecutive sentences].) Accordingly, the trial court must be given the opportunity to exercise its discretion under Senate Bill No. 620.

The amendments pursuant to Senate Bill No. 620 allow the court to strike not only firearm use enhancements under section 12022.5 and section 12022.53, subdivision (b), but also enhancements under section 12022.53, subdivisions (c) and (d), which involve the discharge of a firearm and the discharge of a firearm resulting in death or great bodily injury. While Blue's crimes were serious, the Legislature determined that even in cases involving shootings, injuries and death, striking the enhancement may be appropriate depending upon the individual circumstances of the case. According to the author of the bill, "[Senate Bill No.] 620 allows a court to use judicial discretion, when applying a firearm sentence enhancement, at the time a person is convicted for committing a felony. This is consistent with other sentence enhancement laws and retains existing sanctions for serious crimes. [¶] [¶] Right now these sentences are imposed as a mandate, regardless of the circumstances of a

¹⁵ In selecting the upper term the court identified the following factors: the likelihood of great bodily injury in the course of the robbery; the escalation of violence in Blue's behavior; and the fact that Blue was on probation for a violent felony when the crime occurred.

crime. If for some valid reason a court wanted to impose a lesser sentence they cannot. [¶] [¶] And these mandates are adding to an already long sentence. The individual is already facing a long sentence as a result of a felony conviction. The mandates make a long sentence longer. [¶] [Senate Bill No.] 620 provides the court with discretion to strike a firearm enhancement in any case in which that would be in the interests of justice to do so. A defendant who merits additional punishment for the use of a firearm in the commission of a felony would receive it. [Senate Bill No.] 620 allows a court to decide whether or not to extend the sentence if a specific case indicates that it would be appropriate to do so. [¶] [¶] Longer sentences do not deter crime or protect public safety according to research on these laws. [¶] [¶] Instead, research has found that these enhancements cause problems. They disproportionately increase racial disparities in prison populations and they greatly increase the population of incarcerated persons. [¶] [Senate Bill No.] 620 does NOT eliminate these enhancements. Instead, [it] allows a judge to exercise discretion on whether or not to make a long sentence longer if it is in the interest of justice.” (Sen. Rules Com., Off. of Sen. Floor Analyses, Sen. Bill No. 620 (2017-2018 Reg. Sess., Sept. 13, 2017, pp. 4-5.)

Accordingly, as the record does not demonstrate resentencing would be an idle act, we grant Blue’s request for resentencing pursuant to Senate Bill No. 620.¹⁶

¹⁶ We express no opinion on how the trial court should exercise its discretion under section 12022.53, subdivision (h).

DISPOSITION

The judgment is affirmed as to Russell. With respect to Blue, the judgment of conviction is affirmed; the sentence is vacated, and the matter remanded for the limited purpose of allowing the trial court to resentence Blue in accordance with the principles expressed in this opinion.

BENSINGER, J.*

We concur:

ZELON, Acting P. J.

SEGAL, J.

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