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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.

DAVID ARNOLD SUMLIN,

Defendant and Appellant.

B282873

(Los Angeles County
Super. Ct. No. TA139813)

APPEAL from an order of the Superior Court of Los Angeles County, Allen J. Webster, Jr., Judge. Remanded for resentencing, with directions.

Nancy L. Tetreault, 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, Senior Assistant Attorney General, Scott A. Taryle and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial David Arnold Sumlin was convicted of one count of attempted second degree robbery and four counts of assault with a firearm. The jury found true special allegations Sumlin had personally used a firearm during the attempted robbery and aggravated assaults. Sumlin was sentenced as a second-strike offender, based on a prior juvenile adjudication, to an aggregate state prison term of 18 years. On appeal Sumlin does not challenge his convictions but argues the trial court improperly sentenced him pursuant to a firearm enhancement not found true by the jury. Sumlin further argues remand for resentencing is necessary to allow the trial court to exercise its discretion to strike the firearm enhancements under recent amendment to Penal Code sections 12022.5 and 12022.53.¹ We affirm the convictions and remand for the trial court to hold a new sentencing hearing and to correct several errors in the minute orders recording the verdict and sentence imposed.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Charges

On November 22, 2015 Jose Gonzalez was standing on his back patio when he was approached by two men. One of the men, whom Gonzalez identified at trial as Sumlin, pointed a gun at Gonzalez and demanded money. When Gonzalez said he did not have any money, Sumlin hit him repeatedly on the head with the gun. Gonzalez fell to the ground and called out for help. Gonzalez's three daughters were inside the house and came outside when they heard their father yelling. Sumlin pointed the gun at Gonzalez's daughters and told them to stay back. Gonzalez was able to get to his feet, and he ran inside with his

¹ Statutory references are to this code.

daughters. As they were entering the house, Gonzalez and his daughters heard two gunshots, one of which hit a flower pot near the door. Gonzalez did not see who fired the gun, but one of his daughters testified it had been Sumlin. Once the family had retreated to the house, Sumlin and his companion left the property. DNA extracted from a water bottle found in the driveway after the incident matched Sumlin's DNA.

Sumlin was charged in an information filed July 11, 2016 with one count of attempted second degree robbery (count 1) (§§ 664, 211), four counts of assault with a firearm (count 2, Jose Gonzalez; count 3, Myra Gonzalez; count 4, Stephanie Gonzalez; count 5, Irlanda Gonzalez) (§ 245, subd. (a)(2)) and one count of discharge of a firearm with gross negligence (count 6) (§ 246.3, subd. (a)). As to count 1 it was specially alleged Sumlin had personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c), and had personally used a firearm within the meaning of section 12022.53, subdivision (b). It was also specially alleged as to the four aggravated assault counts that Sumlin had personally used a firearm, "to wit, a HANDGUN," within the meaning of section 12022.5. It was further specially alleged Sumlin had suffered two prior serious or violent felony convictions on July 31, 2009—rape (§ 261, subd. (a)(2)) and oral copulation by force (§ 288a, subd. (c)(2))—within the meaning of the three strikes law.

In an amended information filed January 30, 2017 the prior strike allegation was modified to allege Sumlin had previously been convicted (through a juvenile adjudication) of attempted carjacking (§§ 664, 215, subd. (a)) with a firearm-use enhancement. The initial, summary page of the amended

information continued to list the section 12022.5 firearm-use enhancements for the four aggravated assault counts, as well as now identifying the firearm-use enhancement in section 12022.53, subdivision (b), as also relating to those offenses. However, the amended information omitted from its text the allegation Sumlin had personally used a firearm in committing the aggravated assaults except as to count 5.

2. The Verdict and Sentence

The jury convicted Sumlin of attempted robbery (count 1) and found true the allegation Sumlin had used a firearm during the attempted robbery. The jury found untrue the allegation Sumlin had intentionally discharged a firearm. The jury also convicted Sumlin of four counts of assault with a firearm (counts 2 through 5) and found true Sumlin had personally used a firearm as to each separate count of assault. The jury found Sumlin not guilty of unlawfully discharging a firearm with gross negligence (count 6). In a bifurcated proceeding after Sumlin waived his right to a jury trial on the specially alleged prior juvenile strike adjudication, the court found the allegation true.²

² The only evidence submitted during the bifurcated trial was a “certified priors package,” which the prosecutor represented “shows that Mr. Sumlin was convicted . . . [of] violating Penal Code section 664/215, subsection (a), [(attempted carjacking)] with a Penal Code section 120225.53(b) [(firearm)] enhancement.” The package is not part of the record on appeal. Despite the amended allegation and the prosecutor’s statement, the trial court stated on the record it found true Sumlin had juvenile adjudications for forcible rape and forcible oral copulation. Consistent with the trial court’s oral pronouncement the minute order for May 25, 2017 states the court found true the allegations of prior adjudications for sections 261,

Prior to pronouncing the sentence the court engaged in an extended colloquy with Sumlin during which the trial court told Sumlin, “I believe you did the crime. I believe it sure as I believe today is Thursday and tomorrow is Friday. . . .” “And the thing that’s interesting is, you have basically been convicted at least twice. . . . And each time you say you didn’t do it.” Later, addressing Sumlin’s counsel’s statement Sumlin wanted to change his life, the court stated, “I understand what he’s saying. I’m not discounting that. I’m not suggesting that he’s not sincere or that basically he is a person of bad character or that he’s a person that basically is a threat to society.”

After hearing from the parties and two witnesses who testified in support of Sumlin, the court said, “I have looked at this and researched this and tried to put together something that I think is fair to the People, I think is fair to Mr. Sumlin. And one of the challenges is that you don’t give the court enough to work with. That’s a big problem, Mr. Sumlin. It would be a lot easier to fashion sentences based upon a certain set of criteria if you didn’t have all these priors and you weren’t on probation. So it makes it kind of difficult to be somewhat creative and to be somewhat—how shall I put it—lenient. And I’m using that term because that’s the term that’s been thrown around several times and basically mentioned. And I am sensitive to that, as well I am very sympathetic to the fact that you’re a young man and

subdivision (a)(2), and 288a, subdivision (c)(2). Neither party addresses this discrepancy on appeal. On remand the court must modify its minute order, if necessary, to correctly reflect the offense(s) and statute(s) on which the court based its prior strike finding.

that you are basically trying to move on with your life . . . and I take all that in consideration and respect you for that.”

Upon pronouncing the sentence, the court stated, “And that’s probably the best I could do under the circumstances to give you somewhat of a lenient sentence based upon the law. As I indicated, you gave the court very little to work with. Your record is horrible for a man your age. And you are bright. You are very bright and you are very articulate, very educated. And you can do a lot better in life than you are doing. . . . So I just want you to understand that I tried to do the best I could to be [as] fair to you as I could. But in dealing with you, it’s very difficult because your record basically says that you are a bad person and you’ve committed bad priors. And you are on probation as we speak for drugs.”

The court declined to strike Sumlin’s prior juvenile adjudication for a serious felony offense, but indicated it intended to impose a “reasonable” sentence within the confines of the statutory requirements, stating the sentence would be “nothing near the maximum.”

The court sentenced Sumlin to a state prison term of 18 years. Count 2, the aggravated assault of Gonzalez, was identified as the principal term. The court selected the upper term of four years, doubled under the three strikes law, plus the upper term of 10 years for the firearm enhancement. The court imposed concurrent sentences of the upper term of four years on counts 3, 4 and 5, plus the upper term of 10 years for each corresponding firearm enhancement. On count 1 the court

imposed a concurrent sentence of the upper term of three years, plus 10 years for the firearm enhancement.³

DISCUSSION

1. *The Trial Court Properly Imposed Firearm Enhancements on Counts 2, 3, 4 and 5 Pursuant to Section 12022.5*

Sections 12022.5 and 12022.53 provide distinct sentencing enhancements for a defendant found to have “personally use[d] a firearm” during the commission of a felony. Section 12022.5, subdivision (a), provides for a sentence enhancement of three, four or 10 years for personal use of a firearm during the commission of any felony. Section 12022.53, subdivision (b), provides for a 10-year enhancement for personal use of a firearm during specific enumerated felonies. Assault with a firearm, except for assault with a firearm on a peace officer or firefighter, is not one of the felonies to which section 12022.53 applies. (See § 12022.53, subd. (a).) For either enhancement to apply, “the requisite facts must be alleged in the information or indictment, and defendant must admit those facts or the trier of fact must find them to be true.” (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1124-1125.) Although section 12022.53, subdivision (b), applies to a narrower class of felonies than section 12022.5, the factual

³ Although the court expressly stated it was not going to strike Sumlin’s prior juvenile strike adjudication for sentencing purposes, it failed to double the concurrent determinate terms imposed on counts 1, 3, 4 and 5. In addition, contrary to the court’s oral pronouncement, the minute order for the May 25, 2017 hearing states the firearm enhancements for counts 1, 3, 4 and 5 were stayed pursuant to section 654. Upon resentencing, the court should correct these errors.

elements of the two enhancements are identical. (See CALCRIM No. 3146 [instructing pursuant to both sections 12022.5 and 12022.53, subdivision (b), that “[s]omeone *personally uses* a firearm if he or she intentionally does any of the following: [¶] 1. Displays the weapon in a menacing manner; [¶] 2. Hits someone with the weapon; [¶] OR [¶] 3. Fires the weapon”].)

As discussed, the summary page of the amended information listed both sections 12022.53, subdivision (b), and 12022.5, subdivision (a), as alleged in relation to counts 2 through 5. However, the text of the amended information referred only to section 12022.5 and in connection with count 5 only. The verdict forms submitted to the jury for counts 2 through 5 stated, “It is further alleged that said defendant, David Arnold Sumlin, personally and intentionally used a firearm, a handgun, within the meanint [*sic*] of Penal Code section 12022.53(b). [¶] We find this allegation to be true or not true. (Circle One).” The jury circled “true” for all four aggravated assault counts.

Belatedly recognizing that section 12022.53, subdivision (b), does not apply to the aggravated assaults charged, the prosecutor informed the court of the error during the sentencing hearing, stating Sumlin’s assault convictions were subject to sentence enhancement pursuant to section 12022.5 and not section 12022.53.⁴ Accordingly, in pronouncing sentence for

⁴ Compounding the confusion on this issue, the prosecutor repeatedly referred to the wrong statute while attempting to correct the record, but ultimately arrived at an accurate explanation. The prosecutor stated the verdict “should be 12022.53(a), your honor. . . . 12022.5(a). I misspoke. . . . Just to make clear, it wouldn’t affect the jury’s finding that he personally used a firearm. It just means that he gets the benefit of the 3, 4,

counts 2 through 5, the trial court imposed the sentence enhancements for personal use of a firearm pursuant to section 12022.5, subdivision (a). Sumlin did not object.

Sumlin now argues the trial court's imposition of the section 12022.5 firearm-use enhancement violated his constitutional rights to a jury trial and due process because it was not the enhancement found true by the jury. Although there was repeated misidentification of the firearm-use enhancement applicable to counts 2 through 5, including on the verdict form, because the jury made the necessary factual findings and the court sentenced Sumlin pursuant to the correct statute, the error was harmless.

This court addressed a strikingly similar scenario in *People v. Cory* (1984) 157 Cal.App.3d 1094. In that case the verdict form asked the jury to find whether the defendant had personally used a firearm within the meaning of section 1203.06, which deals with eligibility for probation for an individual who uses a firearm during the commission of certain crimes. The jury found the allegation true. Based on the jury's finding, the trial court imposed the sentence enhancement provided for in section 12022.5. On appeal the defendant argued the trial court improperly applied the section 12022.5 enhancement because it had not been explicitly found true by the jury.

We rejected the defendant's contention, stating, "Here, as generally, the jury's function was to find whether the *facts* necessary for conviction had been proven, by assessment of the evidence admitted at trial in light of the court's instructions

10 triad [under section 12022.5, subdivision (a),] as opposed to, I believe, mandatory consecutive 10 years [under section 12022.53, subdivision (b)]."

defining the types and quanta of facts necessary for conviction. The verdict, culminating this process, was the jury's statement whether it had or had not found those facts. There was no need in this *fact-finding* process for enumeration in the verdict of the statutes that defined the facts to be found or prescribed their legal effects. . . . [¶] These conclusions are buttressed by the fact that the generally approved jury instruction concerning use of a firearm is designed for use in connection with determinations under both sections 1203.06 and 12022.5. . . . Since the *facts* thus to be found under this instruction are the same for each of the two statutes, it logically follows that an affirmative finding rendered by a jury so instructed is sufficient to support the sentencing court's invocation of both section 1203.06 and section 12022.5. For again, the function of the verdict is to register the jury's determination of whether the evidence sufficiently establishes the facts that the instructions recite are necessary to conviction." (*People v. Cory, supra*, 157 Cal.App.3d at pp. 1102-1103.) We concluded, "[T]he jury's finding that appellant personally used a firearm was sufficient to permit the enhancement under 12022.5 even though the finding did not refer to that statute and instead referred to section 1203.06, subdivision (a)(1)." (*Cory*, at p. 1104.)

We see no cause to depart from this reasoning in the present case. From the record as a whole, it is clear Sumlin had notice of the applicable firearm enhancements charged as to each count of the amended information, and he has not argued otherwise in the trial court or on appeal. Further, the jury was properly instructed on the factual elements of section 12022.5 and unanimously found Sumlin had personally used a firearm during the assault of the Gonzalez family. It was not within the

jury's purview to determine the legal consequence of that finding. The error in the verdict form was properly disregarded by the trial court. (See *People v. Cory*, *supra*, 157 Cal.App.3d at p. 1104; see also *People v. Camacho* (2009) 171 Cal.App.4th 1269, 1272-1273 [where jury's intent was clear from the record, citation to incorrect statute on verdict form was a "clerical error" and "surplusage that may be disregarded"]; *People v. Escarcega* (1969) 273 Cal.App.2d 853, 857-858 [same].)

2. *Remand Is Necessary for the Trial Court To Exercise Its Discretion To Strike the Firearm Enhancements*

At the time of Sumlin's sentencing, imposition of the firearm enhancements pursuant to sections 12022.5 and 12022.53 was mandatory. In October 2017 the Legislature passed Senate Bill No. 620, which took effect on January 1, 2018. Sections 12022.5, subdivision (c), and 12022.53, subdivision (h), now provide, "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." Sumlin argues, because his sentence was not final at the time Senate Bill No. 620 came into effect, remand is necessary for the court to exercise its newly enacted discretion to strike the firearm enhancements imposed.

The Attorney General acknowledges sections 12022.5, subdivision (c), and 12022.53, subdivision (h), as amended, apply retroactively to Sumlin and other defendants whose sentences were not final before those provisions came into effect. (See *People v. Arredondo* (2018) 21 Cal.App.5th 493, 507 ["the Legislature, in enacting Senate Bill 620 has made it clear it

intended and expected that its provisions would be applied to all cases pending at the time it became effective”]; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1091.) However, relying on *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, the Attorney General argues remand is not warranted in this case because the record indicates the trial court would not have exercised its discretion to impose a lesser sentence.

As we recently explained in *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081, “In *Gutierrez*, while the appeal was pending in the Court of Appeal, the Supreme Court in a different case held that trial courts have discretion to strike a serious or violent felony conviction under the three strikes law. [Citation.] The Court of Appeal in *Gutierrez* held that resentencing was required ‘unless the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations.’” In *Billingsley* the Attorney General made a similar argument to the one he makes here—that remand for resentencing due to the enactment of Senate Bill No. 620 would be futile because no reasonable court would strike the firearm enhancement imposed. We rejected that argument, holding the record did not “‘clearly indicate’ the court would not have exercised its discretion to strike the firearm allegations had the court known it had the discretion.” (*Billingsley*, at p. 1081.) While we acknowledged the trial court in *Billingsley* had suggested it would not strike the firearm allegation even if it had the discretion to do so, we held such a statement was not determinative because “the court was not aware of the full scope of the discretion it now has under the amended statute. “Defendants are entitled to sentencing decisions made in the exercise of the ‘informed discretion’ of the

sentencing court. [Citations.] 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.”” (*Ibid.*)

For these same reasons we find remand for resentencing is necessary here. The trial court in this case did not “clearly indicate” it would not have stricken any of the firearm enhancements if it had the discretion to do so. While the court described Sumlin’s record as “horrible for a man your age” and stated, “your record basically says that you are a bad person and you’ve committed bad priors,” the court did not express an intent to impose the maximum possible sentence. To the contrary, the court indicated a desire to impose a “reasonable,” more lenient sentence and imposed the sentences on each count to run concurrently. In the absence of any clear indication the court would not have stricken the firearm enhancements, remand is necessary.⁵ (See *People v. Billingsley*, *supra*, 22 Cal.App.5th at p. 1082; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427-428 [holding no “clear indication of an intent by the trial court not to strike one or more of the firearm enhancements”]; cf. *People v. McVey* (2018) 24 Cal.App.5th 405 [holding remand futile when trial court applied upper term to sentence for firearm enhancement citing several aggravating factors that far outweighed mitigating factors and stated upper term was the “only appropriate sentence”].)

⁵ Because we remand for resentencing, we need not address Sumlin’s argument the trial court erred by failing to sufficiently articulate its reasons for imposing the upper term sentence pursuant to section 12022.5, subdivision (a).

*3. On Remand, the Trial Court Is Instructed To Correct
Errors in the Record*

In addition to the several sentencing errors we have noted, the parties have identified two errors in the judgment. First, although the jury found not true the allegation Sumlin had personally and intentionally discharged a firearm (§ 120225.53, subd. (c)) in relation to count 1, the court's minute order from February 8, 2017 simultaneously records a finding of true and not true for the allegation. Second, even though the trial court's oral pronouncement of the sentence on counts 2 through 5 imposed a firearm enhancement pursuant to section 12022.5, subdivision (a), the minute order for May 25, 2017 states the enhancement was imposed pursuant to section 12022.53, subdivision (b). On remand the trial court must modify the February 8, 2017 minute order to state the correct verdict on count 1 and properly indicate the statutory basis for any sentence enhancements it decides to impose on counts 2 through 5.

DISPOSITION

The convictions are affirmed. The sentence is vacated in its entirety, and the matter remanded to allow the trial court to conduct a new sentencing hearing to determine whether to exercise its discretion to strike the firearm enhancements previously imposed under sections 12022.5, subdivision (a) (as to counts 2 through 5), and 12022.53, subdivision (b) (as to count 1). The trial court is directed to modify its minute orders in accordance with this opinion.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.