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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES DAVIS,

Defendant and Appellant.

B284324

(Los Angeles County
Super. Ct. No. LA085169)

APPEAL from a judgment of the Superior Court of Los Angeles County, Susan M. Speer, Judge. Affirmed as modified and remanded.

Athena Shudde, 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, Stephanie A. Miyoshi and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant James Davis guilty of kidnapping for carjacking (Pen. Code, § 209.5, subd. (a); count 1),¹ carjacking (§ 215, subd. (a); count 2), driving or taking a vehicle without consent (Veh. Code, § 10851, subd. (a); count 3), possession of a firearm by a felon (§ 29800, subd. (a)(1); count 4), second degree robbery (§ 211; count 5), grand theft property (§ 487, subd. (a); count 6), and second degree burglary (§ 459; count 7). The jury found true allegations that Davis personally used a firearm (§12022.53, subd. (b); counts 1, 2, 3, 5), and that he personally inflicted great bodily injury (§ 12022.7, subd. (a); counts 1, 2, 5).

On appeal, Davis contends the carjacking conviction in count 2 must be dismissed because it is a lesser included offense of the kidnapping for carjacking conviction in count 1. The Attorney General concedes this point. Davis also argues we should remand the matter for resentencing to allow the trial court to exercise its discretion under new legislation which ended the statutory prohibition on a trial court's ability to strike the firearm enhancement in this case. We remand for resentencing and order the abstract of judgment modified, but otherwise affirm the judgment as modified.

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

BACKGROUND

After trial by jury, Davis was convicted of the crimes as indicated in the outset of this opinion, which were based on two separate incidents.² Outside the presence of the jury, Davis admitted he suffered a prior “strike” within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) for a juvenile adjudication for second degree robbery, and that he served two prior prison terms (§ 667.5, subd. (b)).

At the sentencing hearing, the trial court first heard Davis’s *Romero* motion,³ which it denied. In so ruling, the court summarized Davis’s extensive criminal record dating back from the age of 17, which included a conviction for felon in possession of a firearm, and found Davis had “a serious and increasingly serious criminal history.”

The victim of the kidnapping for carjacking count, a man in his late 40’s, also made a statement at the hearing. He testified he had three surgeries, and a fourth was upcoming. He also suffered great pain, could not sleep, and planned to see a psychiatrist. The court told the victim he went through a “horrendous experience.”

Before imposing sentence, the trial court identified 10 aggravating factors and no mitigating factors. Specifically, the court noted the crime “involved great violence” and “disclose[d] a

² Because the facts established at trial are not relevant to the issues raised on appeal, we do not provide a statement of facts underlying the convictions.

³ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

high degree of cruelty, viciousness and callousness.” It further stated “the manner in which the crimes were carried out indicate[d] planning, sophistication or professionalism,” and that Davis “engaged in violent conduct that indicate[d] a serious danger to society” in this case and based on his past record.⁴

The trial court sentenced Davis to a total term of 33 years to life in state prison for the crimes underlying the two separate incidents. The court imposed a life with the possibility of parole

⁴ At the sentencing hearing, the trial court erroneously believed the Attorney General had filed firearm allegations under section 12022.53, subdivision (g), even though the Attorney General had actually filed firearm allegations under section 12022.53, subdivision (b). Based on its mistaken belief, the trial court substituted the charged firearm enhancements with section 12022.5, subdivision (a), and concluded that such change was “harmless error” because the elements for both firearm statutes were exactly the same, and the jury had been properly instructed. The trial court’s substitution of section 12022.53, subdivision (b) with section 12022.5, subdivision (a) was improper as to counts 1, 2, and 5 because kidnapping for carjacking, carjacking, and robbery are felonies specified under section 12022.53, subdivision (a). The crime of driving or taking a vehicle without consent, however, was within the provisions of section 12022.5, subdivision (a). (*People v. Fialho* (2014) 229 Cal.App.4th 1389, 1398-1399 [“the trial court did not err by imposing a personal firearm use enhancement under former [§] 12022.5, [subd.] (a) after determining that the [§] 12022.53, [subd.] (d) enhancement found true by the jury did not apply to the offenses of which defendant was convicted”].) Because the matter must be remanded for the trial court to exercise its discretion pursuant to the statutory amendment of sections 12022.5, subdivision (c), and 12022.53, subdivision (h), we point these errors out to the trial court to correct at that time.

sentence for the kidnapping for carjacking conviction underlying the first incident, with the minimum parole eligibility period for that count doubled to 14 years due to Davis’s prior strike, plus an additional and consecutive high term of 10 years for the firearm enhancement,⁵ and three years for the great bodily injury enhancement. The court then imposed a consecutive high term of three years for the second degree burglary conviction underlying the second incident, which was doubled to six years due to Davis’s prior strike. The court imposed and stayed sentencing on counts 2, 3, 4, 5, and 6. (§ 654.) The court struck the two prior prison term allegations “due to the sufficiently lengthy prison term already imposed.” (§ 1385.)

Davis filed a timely notice of appeal.

DISCUSSION

I. The Carjacking Conviction Must Be Dismissed

Davis contends, and the Attorney General concedes, the carjacking conviction in count 2 must be dismissed because it is a lesser included offense of the kidnapping for carjacking conviction in count 1. We agree.

“A judicially created exception to the general rule permitting multiple conviction ‘prohibits multiple convictions based on necessarily included offenses.’ [Citation.]” (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.) Thus, “[w]hen a defendant is convicted of a greater and a lesser included offense, reversal of

⁵ We note the trial court also imposed the high term of 10 years on the firearm enhancements for counts 2, 3, and 5.

the conviction for the lesser included offense is required.” (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1416.)

Here, Davis was convicted of both kidnapping for carjacking and carjacking. (§§ 209.5, subd. (a), 215, subd. (a).) It is well settled that carjacking is a necessarily included offense of kidnapping during a carjacking. (*People v. Dowdell, supra*, 227 Cal.App.4th at p. 1416; *People v. Ortiz* (2002) 101 Cal.App.4th 410, 415; *People v. Contreras* (1997) 55 Cal.App.4th 760, 765.) Accordingly, Davis’s carjacking conviction in count 2 must be dismissed.

II. The Trial Court May Exercise its Discretion to Strike the Firearm Enhancements

We agree with Davis that this case must be remanded for resentencing under sections 12022.5, subdivision (c), and 12022.53, subdivision (h). At the time Davis was sentenced, the trial court was prohibited from striking the firearm enhancements imposed in this case under sections 12022.5, subdivision (c), and 12022.53, subdivision (h).

On January 1, 2018, Senate Bill No. 620 took effect, which amends sections 12022.5, subdivision (c), and 12022.53, subdivision (h), to remove the prohibition against striking the gun use enhancements under these statutes. The amendment grants the trial court discretion to strike or dismiss an enhancement imposed under sections 12022.5 and 12022.53. (Stats. 2017, ch. 682, §§ 1 & 2.)

The discretion to strike a firearm enhancement under sections 12022.5 and 12022.53 may be exercised as to any defendant whose conviction is not final as of the effective date of the amendment. (See *People v. Brown* (2012) 54 Cal.4th 314, 323;

In re Estrada (1965) 63 Cal.2d 740, 742-748.) Here, there is no dispute Davis’s appeal was not final when Senate Bill No. 620 went into effect on January 1, 2018. (See *People v. Vieira* (2005) 35 Cal.4th 264, 305 [“a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal”]; *People v. Smith* (2015) 234 Cal.App.4th 1460, 1465 [“A judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari have expired”]; see also *Bell v. Maryland* (1964) 378 U.S. 226, 230 [84 S.Ct. 1814, 12 L.Ed.2d 822] [“The rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it”].)

The Attorney General relies on *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 to argue remand is unwarranted because there is no reasonable possibility the trial court would exercise its new discretion to strike the firearm enhancements. In *Gutierrez*, the trial court sentenced the defendant to the maximum possible sentence, which included an enhancement for a prior strike conviction and two other discretionary enhancements. (*Id.* at p. 1896.) While the defendant’s appeal was pending, the Supreme Court held that trial courts have discretion to strike prior convictions under the three strikes law in the furtherance of justice. The Court of Appeal, however, declined to remand for resentencing. The court reasoned it was obvious the trial court would not exercise its newfound discretion given it increased the defendant’s sentence beyond what it believed was required by the three strikes law and stated the maximum sentence was appropriate. (*Ibid.*)

The Attorney General contends the trial court's identification of 10 aggravating factors and no mitigating factors in support of its sentencing choices, and its imposition of the high-term of 10 years for counts 1, 2, 3, and 5, makes clear the trial court would not have exercised its discretion to strike the enhancements. We disagree.

Here, the trial court's description of the facts of this case was certainly harsh. And given the court's ruling on the *Romero* motion, its comment following the victim impact statement, and its imposition of the high term of 10 years on the firearm enhancements for all counts, we understand that for these reasons, and others, the trial court may very well decline to exercise its discretion to strike any of the firearm enhancements. However, because the record does not clearly indicate whether the trial court would have exercised its discretion, and the court did not impose the maximum penalty available against Davis, i.e., the court imposed some sentences concurrently and struck the two prior prison term allegations, we cannot conclude conclusively that the trial court would not exercise its discretion to modify the sentence. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 ["remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement"].)

Moreover, the fact that "the court was not aware of the full scope of the discretion it now has under the amended statute" favors remand. (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081.) As Division Seven of this court noted in *Billingsley*: ""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, quoting from *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)

Accordingly, we remand to permit the trial court to exercise its newly granted discretion under subdivision (c) of section 12022.5 and subdivision (h) of section 12022.53.

DISPOSITION

The judgment is modified to dismiss the carjacking conviction in count 2. The matter is remanded to the trial court to exercise its discretion under sections 12022.5, subdivision (c), and 12022.53, subdivision (h). The judgment is otherwise affirmed as modified.

ROGAN, J.*

We concur:

RUBIN, Acting P. J.

GRIMES, J.

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