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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES PATRICK DAMM,

Defendant and Appellant.

B276552

(Los Angeles County
Super. Ct. No. BA441353)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald Coen, Judge. Affirmed in part and remanded.

Caneel C. Fraser, 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, Shawn McGahey Webb and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

Charles Patrick Damm appeals from a judgment of conviction of assault with a deadly weapon (firearm), discharge of a firearm at an occupied vehicle, and possession of a firearm by a felon. He argues the trial court erred in excluding evidence which tended to impeach a key witness for the prosecution. We find that any error did not prejudice appellant.

Appellant also argues we must remand for the trial court to exercise its discretion, newly conferred by the passage of Senate Bill No. 620 (2017-2018 Reg. Sess.), to strike firearm use enhancements under Penal Code section 12022.53.¹ We agree and remand the case for that purpose.

FACTUAL AND PROCEDURAL SUMMARY

Appellant and the victim, David Lee, a methamphetamine dealer, were introduced to one another in 2015 by appellant's girlfriend Danyel Crawford, a customer of Lee's. Subsequently, Lee sold methamphetamine to appellant on three occasions without incident.

On November 8, 2015, Lee met with appellant to sell him an ounce of methamphetamine. The meeting took place in Lee's parked vehicle. Lee brought a loaded .38-caliber revolver, which he kept in a pocket behind his front passenger seat. When appellant entered the vehicle, Lee showed him the methamphetamine. Appellant then drew his own firearm and put it to Lee's head, demanding the drugs.

James Brownlee was walking his dog when he came upon the altercation between Lee and appellant. He heard the two men arguing in the vehicle and saw appellant grabbing Lee's shirt. He

¹ Subsequent undesignated statutory references are to the Penal Code.

stopped behind a tree about seven feet from the vehicle and watched Lee and appellant.

Lee got out of the vehicle, followed by appellant. Once appellant exited the vehicle, Lee got back in and attempted to drive away. Appellant then pointed his firearm at Lee, shot and missed him, hitting the vehicle.

Appellant fled into a nearby apartment building immediately after the shooting. Lee crawled out of his vehicle and went for help. Brownlee called the police, who arrived and searched Lee's vehicle, recovering his fully loaded .38-caliber revolver from the pocket behind the passenger seat. They observed a bullet hole in the exterior of the driver's side door of Lee's vehicle. They found appellant in an apartment nearby, in which they also found a .38-caliber revolver loaded with four live rounds and an expended shell casing, indicating the gun had been fired once.²

In December 2015, appellant was charged by information with discharge of a firearm at an inhabited vehicle (Pen. Code, § 246), assault with a deadly weapon (firearm) (§ 245, subd. (a)(2)) with a personal use allegation (§ 1203.06, subd. (a)(1); § 12022.5, subd. (a)), and possession of a firearm by a felon (§ 29800, subd.

² At trial, Crawford testified on behalf of appellant. According to her, Lee had driven to the apartment she shared with appellant and yelled at her, calling her a "bitch." She then went inside and brought appellant out with her. Lee parked his car, got out, and punched appellant in the face. The two started fighting and the fight moved to Lee's car. The car began to roll, prompting them both to get out. Crawford began to retreat towards her apartment building and up a staircase. At that point, she saw Lee pull out a gun. She then ran downstairs and heard a gunshot.

(a)(1).) The information also alleged appellant had a prior strike under section 667, subdivision (d), a prior serious felony conviction under section 667, subdivision (a)(1), and seven prison priors under section 667.5, subdivision (b). Appellant pleaded not guilty to all three counts and the case was called for jury trial in March 2016. The court struck the personal use allegation under section 1203.06, subdivision (a)(1). Appellant waived trial on his prior convictions.

At a pretrial conference, the prosecutor objected to the inclusion of printed Facebook messages purportedly sent by Lee to Crawford. These messages were sent on November 12, 2015, after the shooting, and stated:

“Hey you stupid bitch. What the fuck you doing lying on me? Your stupid dumb nigger ass boyfriend is in jail and I’m out. . . . He is going to go away for a life, bitch. I better not catch you slippin’ in the same areas. Now you’re really toast. You ain’t got no one. . . . You’re so fucking stupid that it’s crazy, how you would lie to someone else about me. Stay away. Move away. I mean it. You better not be walking or getting momo’s . . . in the same area because I know where you be getting them. How does it feel bitch.”

An earlier preshooting message in the same conversation stated “[i]t’s David” followed by “HMu” and a phone number. Defense counsel argued these Facebook messages were admissible to impeach Lee’s credibility because they constituted threats against a witness. The court ruled the messages were inadmissible under Evidence Code section 352 because their probative value was outweighed by their potential to confuse issues for the jury.

At trial, Lee admitted he had sent Facebook messages to Crawford, but denied he had threatened her or told her to “leave town.” Based on this, defense counsel asked the court to reconsider its ruling excluding the Facebook messages, arguing they directly contradicted Lee’s testimony. The court agreed that Lee’s testimony had rendered the messages relevant to his credibility. The prosecution objected, arguing the messages lacked foundation. An Evidence Code section 402 hearing was held, at which Crawford testified that she knew the Facebook messages were sent by Lee because the messages came from an account displaying Lee’s name and photo. She testified that Lee’s Facebook account was password protected and that she had seen him log into his account with a password. The court ruled the messages were inadmissible for lack of foundation.

Brownlee was called to testify by the prosecution. His testimony corroborated that of Lee, with both men indicating that appellant was the shooter.³

Lee admitted he met with appellant intending to sell methamphetamine and that he was armed on the day of the shooting. He also admitted he had lied to authorities before being offered use immunity for his testimony. Lee also was impeached by evidence of his prior convictions for selling drugs.

The jury found appellant guilty on all counts and found the personal use allegation as to the assault charge to be true. The court sentenced appellant to the upper term of four years for assault with a deadly weapon (firearm), which was doubled to

³ Although Brownlee admitted that he could not see appellant’s hands due to his vantage point, he stated that he saw appellant “maneuver” in a manner indicating he had pulled out a gun moments before Brownlee heard a gunshot.

eight years due to a prior strike under section 667, subdivision (e)(1). The court added 10 years to that sentence under section 12022.5, subdivision (a) based upon the jury's personal use finding. The court sentenced appellant to the upper term of seven years for discharge of a firearm at an inhabited vehicle, which was doubled under section 667, subdivision (e)(1) to 14 years due to appellant's strike prior. Pursuant to section 654, the court stayed imposition of that sentence. The court then sentenced appellant to the upper term of three years for possession of a firearm by a felon, doubled to six years due to appellant's strike prior. That sentence was ordered to be served concurrently with his sentence for assault with a deadly weapon. The court also sentenced appellant to five years pursuant to section 667, subdivision (a)(1). In total, appellant was sentenced to 23 years in state prison.

This appeal followed.

DISCUSSION

I

Appellant argues the trial court erred in excluding Facebook messages purportedly sent by Lee to Crawford. The ruling was based on lack of foundation. Writings found on social media may be properly authenticated on the same basis as other writings, by a showing sufficient to support a conclusion by the trier of fact that the evidence is what it purports to be. (*People v. Valdez* (2011) 201 Cal.App.4th 1429, 1435 (*Valdez*).) The question of what constitutes a sufficient showing that the social media content is authentic has not yet been fully developed under California law.⁴ We do not need to wade into these uncharted

⁴ The leading California cases discussing the authentication of social media content are *Valdez* and *People v. Beckley* (2010)

waters because, as we explain, even assuming the court erred in excluding the Facebook messages, the error was harmless beyond a reasonable doubt. It therefore does not require reversal under either the federal *Chapman* or state *Watson* standards.

(*Chapman v. California* (1967) 386 U.S. 18, 24 [reversal not required unless error is harmful beyond a reasonable doubt]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [reversal not required unless it is reasonably probable defendant would have obtained better result absent error].)

Ample evidence demonstrated appellant's guilt apart from Lee's testimony. (*People v. Jennings* (2010) 50 Cal.4th 616, 691 [error is harmless where there is overwhelming evidence of defendant's guilt].) Police observed a bullet hole in Lee's vehicle. Just after the shooting, a gun was found in the apartment into which appellant had fled. An expended shell casing was found, indicating the gun had been fired. In contrast, Lee's weapon, the

185 Cal.App.4th 509 (*Beckley*), questioned by *In re K.B.* (2015) 238 Cal.App.4th 989. Neither case provides a bright line rule or conceptual framework for resolving questions raised by the authentication of evidence found on social media. Instead, each decision was reached on the basis of analysis of the particular facts at issue. In *Valdez*, the court found that photographs and other content on the social media website MySpace were properly authenticated based, among other factors, on the "pervasive consistency" of content found on the defendant's MySpace page indicating the page belonged to him and testimony that MySpace was a password protected platform. (*Valdez, supra*, 201 Cal.App.4th at p. 1436.) In contrast, the court in *Beckley* rejected a photograph found on MySpace due to, among other factors, a lack of testimony identifying the person in the photograph and a lack of expert testimony stating that the photograph was not doctored. (*Beckley, supra*, at pp. 515-516.)

only other gun recovered from the scene, was fully loaded, indicating it had not been fired. Brownlee's testimony corroborated Lee's assertion that appellant was the shooter.

Further impeachment of Lee would have been unnecessarily cumulative. (Evid. Code, § 352; *People v. Trujeque* (2015) 61 Cal.4th 227, 228 [excluding cumulative evidence is harmless].) Lee was impeached on other bases, including his criminal history and past false statement to authorities. Even had the jury learned of another instance of Lee's dishonesty through the admission of the Facebook messages, it is highly improbable that it would have changed its verdict, given the physical evidence, Brownlee's testimony, and other impeachment evidence against Lee.

II

Appellant was sentenced to the upper term of 10 years for personal use of a firearm under section 12022.5, subdivision (a). At the time of sentencing, that section provided no discretion to the trial court to strike a firearm use enhancement. Following the sentencing, section 12022.5 was amended by the passage of Senate Bill No. 620 and now allows the trial court, in its discretion, to strike firearm use enhancements. The amended statute provides: "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." (§ 12022.5, subd. (c).)

When a criminal statute is amended to lessen the severity of punishment for an offense, it applies to all cases in which

judgment is not yet final. (*In re Estrada* (1965) 63 Cal.2d 740, 744.) As Senate Bill No. 620 became effective on January 1, 2018 and appellant's case has not yet resulted in a final judgment, the amended statute applies to his case.

Criminal defendants are entitled to "sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) When the trial court erroneously assumes it lacks sentencing discretion, the proper remedy is remand so that sentencing discretion may be exercised. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530, fn. 13.) Although the trial court did not misunderstand its powers in this case, since it correctly believed it lacked discretion under the law prevailing at the time, this situation is analogous to that discussed in *Romero*. Here, the trial court sentenced appellant under the previous version of section 12022.5, which forbade striking a firearm use enhancement. Remand is necessary to allow the court to exercise its discretion under the amended version of the statute.

Respondent argues that because the trial court exercised its discretion to impose the high term for the firearm enhancement, it would be futile to remand this case. (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 (*Gutierrez*) [remand is required "unless the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike"].) It is not for this court to judge how the trial court would exercise its discretion following the opportunity to hear appellant's arguments in favor of striking the firearm enhancement. It is more prudent to remand except where no reasonable court could exercise discretion in the appellant's favor.

We cannot say that no reasonable court would exercise discretion in appellant's favor in this case.

DISPOSITION

The matter is remanded for the trial court to exercise its discretion under section 12022.5. In all other respects, the judgment is affirmed.

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EPSTEIN, P. J.

I concur:

COLLINS, J.

WILLHITE, J.

I concur in the majority opinion to the extent it affirms the judgment of conviction. However, I respectfully dissent from the order of remand. In sentencing appellant, the trial court has already exercised its discretion in a manner which conclusively demonstrates that it would not have stricken the firearm enhancement if it had had the discretion to do so at the time of sentencing. In these circumstances, appellant is not entitled to a remand for an additional exercise of discretion whether to strike the enhancement under amended section 12022.5, subdivision (c) and section 1385.

During an aborted methamphetamine transaction in the SUV of victim David Lee, appellant drew a gun, put it to the Lee's head, accused Lee of threatening appellant's girlfriend, and demanded methamphetamine. Following a brief struggle, Lee and appellant ended up outside the SUV. When Lee got back in the vehicle and tried to start it, appellant, from three feet away outside the vehicle on the driver's side, fired a shot at Lee which struck the vehicle. Lee thought he might have been hit (he was not), crawled out the passenger door, and fled.

On these facts, a jury convicted appellant on count 1 of shooting at an occupied motor vehicle (§ 246), on count 2 of assault with a firearm (§ 245, subd. (a)(2)) committed with personal use of a firearm (§ 12022.5, subd. (a)), and on count 3 of being a felon in possession of a firearm (§ 29800, subd. (a)(1)). Appellant admitted a prior felony conviction that constituted both a strike (§ 667, subds. (b)–(i)) and a serious felony (§ 667, subd. (a)(1)), and also admitted seven prior prison terms (§ 667.5, subd. (b)).

At sentencing, the trial court denied appellant's *Romero* motion to strike his prior strike conviction, based on appellant's lengthy criminal history, the seriousness of the instant offenses, and the fact that appellant was on probation. The court detailed appellant's record as follows: "In this case the strike prior and the serious prior on the 667(a)(1) is a robbery from 1995. However, I do note in looking at defendant's record that he was convicted of a felony; that he received six years in state prison in June of 1998; convicted of a felony which he went to state prison for 32 months in

July of 2003; was convicted of a felony, possession of a controlled substance, which he went to state prison for 44 months in 2007; was convicted of another felony which he received concurrent terms on that same time; was convicted of petty theft with a prior in which he received probation in 2010; a misdemeanor, which he was convicted in 2011; a felony, which he received three years in state prison; possession of a controlled substance in 2012; a felony, possession of a controlled substance, which he went to state prison again in 2012; vandalism, which he was convicted as a misdemeanor, which he was on probation at the time of the commission of this offense in 2013; possession of a controlled substance, which was made a misdemeanor; and possession of drug paraphernalia in which the conviction was in 2014; and pending his sentencing at the time of the commission of this offense. [¶] Based upon defendant's record and the facts as I see them in this case, I cannot say the defendant is outside the spirit of the scheme of Three Strikes law and the motion . . . is denied."

Next, the court stated its intention to strike the seven prison priors in furtherance of justice under section 1385. The court did so not for leniency, but because with one exception, the felonies underlying the prison priors were for crimes that were subject to reclassification as misdemeanors under Proposition 47. The court stated, in substance, that it wanted to avoid concerns regarding the legality of imposing enhancements for prior prison terms that are predicated on felony offenses that might be reduced to misdemeanors pursuant to Proposition 47 (§ 1170.18), an issue that is currently under review by the California Supreme Court in *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted March 30, 2016, S232900, as well as several other cases. The trial court noted, however, that despite striking the prior prison term enhancements, it still intended to use the numerous prior convictions as aggravating factors.

The trial court then imposed a sentence of 23 years in state prison on count 2, assault with a firearm, calculated as follows: the upper term of four years for the conviction, doubled pursuant to the Three Strikes law, plus the upper term of 10 years (rather than either of the lesser terms, 3 or 4 years)

for the firearm enhancement under section 12022.5. The court cited in aggravation the fact that the defendant was on probation and awaiting sentence in another case at the time of the instant offense, and that he had suffered numerous prior felony convictions. In addition, the court imposed a mandatory sentence of an additional five years for the prior serious felony conviction.

On count 1, shooting at an occupied vehicle, the court imposed a term of 14 years, stayed pursuant to section 654. On count 3, felon in possession of a firearm, the court imposed a term of six years. Despite appellant's prior strike conviction, the court ordered that sentence to run concurrent, rather than consecutive, based on the "close spacial and temporal proximity" of the possession offense to the assault in count 2.

The court's various sentencing choices, especially its choice to impose the upper term on the section 12022.5 enhancement in count 2, conclusively demonstrates that a remand would be a useless act. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [remand to allow trial court to exercise its discretion to dismiss a conviction under the Three Strikes law unnecessary where the trial court had imposed the maximum sentence including the upper term on one count and discretionary enhancements].)

First, amended section 12022.5, subdivision (c) gives the court discretion "in the interest of justice pursuant to Section 1385 and at the time of sentencing" to strike a section 12022.5 enhancement. Section 1385, in turn, authorizes the court to strike an enhancement or the punishment for the enhancement (subd. (c)) "in furtherance of justice" (subd. (a)).

However, in choosing among the three terms available for sentencing under section 12022.5 (three, four, or 10 years), the trial court has already made a determination that the upper term of 10 years "best serves the interest of justice." (Cal. Rules of Court, rule 4.428(a) (rule 4.428). Rule 4.428(a) provides in relevant part: "If an enhancement is punishable by one of three terms, the court must, in its discretion, *impose the term that best serves the interest of justice* and state the reasons for its sentence choice on

the record at the time of sentencing.” (*Italics added.*) That is what the trial court did: it determined that the upper term of 10 years best serves the interests of justice, and stated its reasons for imposing that term (that defendant was on probation, and that he had numerous prior felony convictions). It must be remembered that this remand is not for resentencing—that is, not for the court to reconsider the discretionary sentencing choices already made—but solely for an additional exercise of discretion under section 1385 and 12022.5, subdivision (c) whether to strike the enhancement. But that additional exercise of discretion has been obviated by the court’s express exercise of discretion to impose the upper term for the section 12022.5 enhancement as the term that “best serves the interest of justice” (rule 4.428(a)). Thus, it makes no sense to remand the case for an additional exercise of discretion whether, “in furtherance of justice” (§ 1385), to impose no sentence at all.

Second, the record fails to reveal any legitimate mitigating factor (and appellant has cited none) that might justify striking the enhancement in its entirety under section 1385, rather than imposing even the minimum three-year term, which the court has already expressly decided not to impose.

Third, nothing in the court’s other sentencing choices suggests that the court might grant appellant leniency and strike the firearm enhancement. The court’s exercise of discretion in sentencing appellant was informed and comprehensive. In particular, it struck the prison priors to avoid the issue, pending in the California Supreme Court, whether a felony conviction can support a section 667.5, subdivision (b) prior after the defendant has obtained a reclassification of the offense as a misdemeanor under Proposition 47. It correctly ordered the sentence on count 1, shooting at an occupied vehicle, stayed pursuant to section 654. Consistent with the Three Strikes law, it ordered the sentence on count 3, felon in possession of a firearm, to run concurrent based on the “close spacial and temporal proximity” of the possession offense to the assault in count 2. These choices reflect a knowledgeable, considered exercise of discretion to fashion the

appropriate sentence, one that included a term of 10 years for the firearm enhancement. They do not raise any possibility that the court might exercise its discretion to strike the enhancement on remand.

In short, the trial court has already exercised its discretion in a manner that conclusively shows it would not have stricken the firearm enhancement if it had had the discretion to do so at the time of sentencing. That the trial court might now have an inexplicable change of heart is no reason to burden the court with a remand.

WILLHITE, J.