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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOSE LEPE PRIETO, Defendant and Appellant.	B286250 (Los Angeles County Super. Ct. No. PA086910)

APPEAL from judgment of the Superior Court of Los Angeles County, Cynthia L. Ulfig, Judge. Affirmed in part, reversed in part.

Jason Szydlik, 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, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, David A. Wildman, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Jose Lepe Prieto guilty of assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4))[1] and one count of felony elder abuse (§ 368, subd. (b)(1)). Prieto admitted to suffering one prior serious and/or violent felony conviction under the three strikes law (§§ 667, subds. (b)–(i), 11710.12, subds. (a)–(d)), and to having served two prior prison terms (§ 667.5, subd. (b)).

The court sentenced Prieto to seven years in prison in count 1, consisting of the middle term of three years doubled under the three strikes law, plus one year under section 667.5, subdivision (b). In count 2, it sentenced him to a consecutive sentence of six years in prison, consisting of the middle term of three years doubled under the three strikes law. The court did not impose or strike the second prior prison term enhancement under section 667.5, subdivision (b). The court awarded Prieto a total of 857 custody credits; the court did not include in its calculation of custody credits 53 actual credits for time the court believed Prieto had served in Patton State Hospital.

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[1] All further references are to the Penal Code unless otherwise indicated.

Prieto contends that: (1) the sentence in count 2 must be stayed pursuant to section 654 because the convictions in counts 1 and 2 were based on the same act; (2) the trial court erred by failing to instruct the jury on misdemeanor elder abuse, a lesser included offense of felony elder abuse; and (3) he is entitled to 904 custody credits.

The Attorney General agrees with Prieto that the sentence in count 2 must be stayed pursuant to section 654, and that he is entitled to 904 custody credits, but argues that the trial court was not required to instruct on misdemeanor elder abuse in count 2 because there was insufficient evidence to support a conviction of the lesser offense and Prieto was not prejudiced by the omission.

Following our initial review of the record, we invited the parties to brief the issue of the trial court's failure to either strike or impose the second section 667.5, subdivision (b) enhancement. The Attorney General argues that remand is necessary. Prieto asserts that remand is not required in light of the fact that the underlying felony conviction has since been reduced to a misdemeanor under Proposition 47.

We order the abstract of judgment modified to reflect that the sentence imposed in count 2 is stayed pursuant to section 654, and that Prieto is awarded 452 actual credits and 452 conduct credits, for a total of 904 custody credits. In all other respects the judgment is affirmed.

FACTS

On August 4, 2016, Daria Ponce called 911 and told the operator that Prieto had just tried to strangle his grandmother, Maria Sanchez. Officers Hugo Virrueta and Robbie Espinoza of the Los Angeles Police Department responded to the scene. Officer Virrueta testified that Sanchez told him Prieto attempted to strangle her. Sanchez explained to the officer that Prieto had been drinking all day and arguing with her. Sanchez called Ponce and asked her to come over because she could usually calm Prieto down, but Prieto became angry when Ponce arrived. He lunged at Sanchez, put his hands around her neck, and tried to strangle her. She almost lost consciousness. Sanchez pushed Prieto away and ran out of the apartment. Sanchez complained of pain but refused medical treatment, stating that she would seek treatment on her own. Officer Virrueta testified that Prieto was intoxicated, and that the officers took him into custody.

At trial, Sanchez, her husband,[2] and Ponce all denied telling police Prieto had tried to strangle Sanchez. Sanchez testified that Prieto did not injure her. Sanchez was 82 years old when she testified on September 26, 2017.

[2] Sanchez's husband was present during the attack.

DISCUSSION

Section 654

Prieto contends, and the Attorney General agrees, that the trial court erred by failing to stay the sentence in count 2, because the offenses in counts 1 and 2 were based on the same act, and a defendant may not receive multiple punishments for a single act under section 654. We agree with the parties that section 654 bars multiple punishment in this instance, and we order the abstract of judgment modified to stay the sentence imposed for elder abuse in count 2.

Legal Principles

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "'If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507.) "The question whether section 654 is factually applicable . . . is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question

must be upheld on appeal if there is any substantial evidence to support them." (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312 (*Hutchins*).) ""'We must 'view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]' [Citation.]" [Citation.]' (*Hutchins*, *supra*, 90 Cal.App.4th at pp. 1312–1313.)" (*People v. Tarris* (2009) 180 Cal.App.4th 612, 627.) "'Where multiple punishment has been improperly imposed, ". . . the proper procedure is for the reviewing court to modify the sentence to stay imposition of the lesser term. [Citation.]" [Citation.]' (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1248.)" (*People v. Spirlin* (2000) 81 Cal.App.4th 119, 131 (*Spirlin*).)

Analysis

In this case, the trial court and the parties correctly agreed at the sentencing hearing that the offenses were subject to section 654 because they were based on the same act—Prieto's single attempt to strangle his grandmother. The trial court mistakenly imposed a concurrent sentence rather than staying the sentence in count 2 as required. (See *Spirlin*, *supra*, 81 Cal.App.4th at p. 131 [where multiple punishment is improperly imposed, proper course is to order the lesser sentence stayed].) We therefore order that the abstract of judgment be modified in count 2 to reflect that the sentence in that count is stayed.

Instructional Error

At trial, the prosecutor requested that CALCRIM No. 831, which instructs the jury regarding the offense of misdemeanor elder abuse (§ 368, subd. (c)), be withdrawn. Defense counsel stated that she had no objection to withdrawal of the instruction, and the trial court withdrew it. Prieto contends that the trial court had a sua sponte duty to instruct on misdemeanor elder abuse, which is a lesser included offense of felony elder abuse, because there was substantial evidence from which the jury could conclude that he had committed the lesser offense and not the greater one. We conclude that even if the trial court erred, Prieto's conviction on felony elder abuse must be affirmed because he has not established prejudice.

Legal Principles

"'The trial court must instruct even without request on the general principles of law relevant to and governing the case. [Citation.] . . . [Citation.]' [Citation.]" (*People v. Saavedra* (2018) 24 Cal.App.5th 605, 614.) "'The obligation to instruct [sua sponte] on lesser included offenses [as opposed to defenses] exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.] Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the

evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. [Citations.]' (*People v. Breverman* (1998) 19 Cal.4th 142, 154–155.) '[I]nsofar as the duty to instruct applies regardless of the parties' requests or objections, it prevents the "strategy, ignorance, or mistakes" of *either* party from presenting the jury with an "unwarranted all-or-nothing choice," encourages "a verdict . . . no harsher *or more lenient* than the evidence merits" [citation], and thus protects the jury's "truth-ascertainment function" [citation]. "These policies reflect concern [not only] for the rights of persons accused of crimes [but also] for the overall administration of justice." [Citation.]' (*Id.* at p. 155.)" (*People v. Golde* (2008) 163 Cal.App.4th 101, 115 (*Golde*).)

"In a noncapital case, the error in failing to instruct on a lesser included offense is reviewed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, which requires reversal of the conviction for the greater offense 'if, "after an examination of the entire cause, including the evidence" [citation], it appears "reasonably probable" the defendant would have obtained a more favorable outcome had the error not occurred.' [Citation.] Probability under *Watson* 'does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility.' (*People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 918.)" (*People v. Racy* (2007) 148 Cal.App.4th 1327, 1335 (*Racy*).)

"[T]he difference between felony elder abuse and misdemeanor elder abuse is whether the abuse is

perpetrated 'under circumstances or conditions likely to produce great bodily harm or death.' If it is, the crime is a potential felony. (§ 368, subd. (b)(1).) If it is not, the crime is a misdemeanor. (§ 368, subd. (c).) Misdemeanor elder abuse is a lesser included offense of felony elder abuse. [Citations.]" (*Racy*, *supra*, 148 Cal.App.4th at pp. 1334–1335.)

Analysis

As we have discussed, the counts in this case were based on the same act. Although the jury was not given the option to find Prieto guilty of the lesser offense in count 2, it was given the option in count 1. As is the case with the greater and lesser offenses of felony and misdemeanor elder abuse, the difference between simple assault (§ 240) and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)), is the likelihood that the defendant's conduct will produce great bodily injury. (*Golde*, *supra*, 163 Cal. App.4th at pp. 115–117.) The jury found that Prieto committed assault by means of force likely to produce great bodily injury in count 1 although given the option of finding that he did not employ a level of "force likely to produce great bodily injury." The jury's verdict compels the conclusion that it would have found Prieto perpetrated elder abuse "'under circumstances or conditions likely to produce great bodily harm or death'" in count 2 even if given the alternative to convict him of the lesser offense of

misdemeanor elder abuse. (*Racy*, *supra*, 148 Cal.App.4th at p. 1334.) It is not reasonably probable that Prieto would have obtained a better outcome if the jury had been instructed regarding the lesser offense.

Custody Credits

We agree with the parties that the trial court miscalculated Prieto's custody credits. At sentencing, the trial court awarded Prieto a total of 857 credits, based on the mistaken belief that Prieto served 53 days in Patton State Hospital during the period in which his competency to stand trial was being evaluated. The court did not award Prieto conduct credit for those days, because defendants may not accrue conduct credits for time spent in a state hospital because that period of confinement is not considered punitive. (*People v. Bryant* (2009) 174 Cal.App.4th 175, 177.) In fact, Prieto was incarcerated in a penal institution from his arrest on August 4, 2016, until he was sentenced on October 30, 2017—a total of 452 days— and was never housed at Patton State Hospital. He is therefore entitled to a total of 904 custody credits, consisting of 452 actual credits and 452 conduct credits. (§ 4019, subd. (f) [for days earned under § 4019, "a term of four days will be deemed to have been served for every two days spent in actual custody"].) We may correct an unauthorized sentence on appeal. (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647.) We order that

the abstract of judgment be amended to properly reflect the number of credits Prieto has earned.

Section 665.7, Subdivision (b) Enhancements

The information alleged, and Prieto admitted, that he had served two prior prison terms within the meaning of section 667.5, subdivision (b).[3] At sentencing, the trial court imposed a single one-year enhancement pursuant to section 667.5, subdivision (b). It did not strike or impose the second section 667.5, subdivision (b) enhancement.

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[3] Section 667.5, subdivision (b), provides in relevant part: "Except where subdivision (a) applies, where the new offense is any felony for which a prison sentence or a sentence of imprisonment in a county jail under subdivision (h) of Section 1170 is imposed or is not suspended, in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended for any felony; provided that no additional term shall be imposed under this subdivision for any prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and prison custody or the imposition of a term of jail custody imposed under subdivision (h) of Section 1170 or any felony sentence that is not suspended."

"[A] section 667.5, subdivision (b) prior prison term enhancement may be stricken pursuant to section 1385, subdivision (a)." (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1561 (*Garcia*).) Once such an enhancement is found true, it must be imposed or stricken. (*Ibid.*; *People v. Campbell* (1999) 76 Cal.App.4th 305, 311.) "To neither strike nor impose a prior prison term enhancement is a legally unauthorized sentence." (*People v. Bradley* (1998) 64 Cal.App.4th 386, 390 (*Bradley*).) Where an unauthorized sentence exists, the appellate court may take action on its own motion to correct it. (*People v. Smith* (2001) 24 Cal.4th 849, 852; *People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.)

The Attorney General argues that the proper course of action is to remand to the trial court to either impose or strike the enhancement. Prieto asserts that remand is unnecessary because one of the two prior prison terms he admitted serving was for a violation of Health and Safety Code section 11377, in Superior Court of Los Angeles County, No. PA077014, which was reduced to a misdemeanor conviction pursuant to Proposition 47 on June 4, 2018. Prieto filed a motion requesting that we take judicial notice of the minute order reflecting that the court granted his Proposition 47 petition, which we granted.

We agree with Prieto that we need not remand to the trial court on this issue, as there is no longer a basis for the enhancement. A prior prison term enhancement requires proof that the defendant "'was previously convicted of a felony . . . .'" (*People v. Buycks* (2018) 5 Cal.5th 857, 889

(*Buycks*); see *People v. Tenner* (1993) 6 Cal.4th 559, 563.) After a successful Proposition 47 application, a defendant's prior felony conviction "becomes 'a misdemeanor for all purposes,'" and it "can no longer be said that the defendant 'was previously convicted of a felony.'" (*Buycks*, *supra*, at p. 889.)

DISPOSITION

We remand the matter to the trial court to modify the abstract of judgment to reflect that the six-year sentence imposed in count 2 is stayed pursuant to section 654, and that Prieto is awarded 452 actual credits and 452 conduct credits, for a total of 904 custody credits. The trial court is directed to provide a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

MOOR, J.

WE CONCUR:

RUBIN, P. J.

BAKER, J.