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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 EIGHT

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| THE PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JOSE ENRIQUEZ,<br><br>Defendant and Appellant. | B282832<br>(L.A. Super. Ct. No. BA441851) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Mildred Escobedo, Judge. Affirmed as modified.

David M. Thompson, 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, Scott A. Taryle and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Jose Enriquez broke into his neighbor's house when only a 15-year-old girl, L.R., and her pregnant older sister, A.R., were home, threatened them both, demanded property from A.R., and escaped with a few items from another room. He was convicted of two counts of burglary (one for each victim) and the attempted robbery of A.R. As to all three counts, an allegation that he personally used a deadly or dangerous weapon – a knife – in the commission of the offenses was found to be true. On appeal, defendant challenges only the sufficiency of the evidence of the knife enhancement with respect to the counts pertaining to A.R. We conclude the evidence is sufficient. However, we modify the judgment to correct a sentencing error.

**FACTUAL AND PROCEDURAL BACKGROUND**

Defendant lived next door to his victims. The family living in the victims' home included L.R., A.R., their older sister N.R., N.R.'s husband Julio, and N.R. and Julio's two young children. The family was neighborly with defendant, exchanging pleasantries regularly. Julio was somewhat more friendly with defendant, having given him advice to give up drugs and his "gang banging life," for the benefit of defendant's child. Julio had also loaned defendant money a few times, when defendant needed it for his daughter.

At around 4:00 p.m. on Thanksgiving Day, 2015, defendant knocked on the family's front door. A.R. answered and defendant asked for Julio. A.R. told defendant that Julio was not there, and defendant left.

Defendant returned to the house around 6:15 p.m. He gained entry through the window in the children's bedroom. Defendant, who was attempting to hide his face, then entered the

room where L.R. was lying on the bed, using her tablet computer. He told her not to scream, grabbed a pillow and put it on her face. L.R. originally remained quiet, but when she could not breathe because of the pillow, she started screaming for A.R. Defendant said, "If you scream one more time, I am going to kill you." Defendant had a six-inch knife in his hand, which he held toward L.R.'s neck. L.R. struggled against defendant, pushed the pillow away, and fled down the hall and out of the house. The family lived in a back house with their landlord living in the front house. L.R. ran to the landlord's house, screaming that someone was in the house trying to kill her sister. The landlord ran to investigate; his wife called 911.

During the encounter, A.R. had heard L.R. screaming for her, and got up to see what was going on. She encountered defendant in the hallway, while L.R. was running away screaming. Defendant told A.R. to tell L.R. not to scream, and that if L.R. continued to scream, he would kill A.R. He demanded A.R.'s car keys. A.R. saw the six-inch knife in defendant's hand. She was scared, but she did not give him anything. Defendant left the house, heading toward the back; A.R. left also, heading toward the landlord's house in front.

Police arrived and defendant was arrested that night as he walked out of his apartment complex. Although defendant had hidden his face during the home invasion, both L.R. and A.R. recognized his voice. A.R. also noticed that he was wearing the same pants that he wore when he had knocked on the door earlier that day. During the burglary, defendant had covered his mouth with a green shirt; the shirt was found by police behind the residence where defendant was arrested. DNA on the shirt matched defendant.

Defendant was charged by information with two counts of first degree burglary with person present (Pen. Code, §§ 459, 460, subd. (a), 667.5, subd. (c)(21)) and two counts of attempted robbery (Pen. Code, §§ 664, 211) – one count of each crime pertaining to L.R. and one to A.R. It was further alleged as to each count that defendant personally used a deadly or dangerous weapon (a knife) in the commission of each felony. (Pen. Code, § 12022, subd. (b)(1).) Various sentence enhancements based on prior convictions were also alleged. Defendant pleaded not guilty and the case proceeded to jury trial. Trial of the prior conviction allegations was bifurcated.

The jury acquitted defendant of the attempted robbery of L.R., and convicted him of the remaining three counts. The knife allegation was found true with respect to all three counts. Defendant then admitted a prior serious felony conviction within the three strikes law, and the prosecution dismissed all other prior conviction allegations.

For the count of burglary with respect to L.R., defendant was sentenced to the upper term of 6 years, doubled for the strike, plus an additional year for the knife enhancement, for a total of 13 years in prison. The same term was imposed, concurrently, based on the same calculations, for the attempted robbery of A.R. A consecutive sentence on the second burglary count was imposed and stayed under Penal Code section 654.

Defendant filed a timely notice of appeal.

## DISCUSSION

1. *The Evidence of Knife Use With Respect to A.R. Was Legally Sufficient*

Penal Code section 12022, subdivision (b)(1) provides, "A person who personally uses a deadly or dangerous weapon in the

commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense." Defendant argues that there was insufficient evidence to support the jury's finding that he used a knife in connection with the crimes against A.R. He does not challenge the evidence that he used a knife when committing burglary with L.R. present, nor that there was evidence that he was armed with a knife during his interaction with A.R. His argument is only that he did not *use* the knife in the course of his burglary and attempted robbery of A.R.

" ' "We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction. [Citation.] Thus, we presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence." [Citation.]' [Citation.] 'The question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the elements of the underlying enhancement beyond a reasonable doubt.' [Citation.]" (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144 (*Hajek*), overruled on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192.)

"In determining whether there was substantial evidence of [a defendant's] knife use, we may properly consult cases construing the term 'uses' in other enhancement statutes under ' "The Dangerous Weapons' Control Law." ' [Citation.] Hence, we may rely on cases construing the term as it is understood for purposes of section 12022.5, which addresses personal use of a firearm in the commission or attempted commission of a felony. [Citations.]" (*Hajek, supra,* 58 Cal.4th at p. 1198.)

"Whether a gun is 'used' in the commission of an offense—'at least as an aid'—is broadly construed within the factual context of each case. There are no precise formulas, or particular fact patterns to follow, to determine whether a gun has been 'used' for purposes of a sentence enhancement." (*Alvarado v. Superior Court* (2007) 146 Cal.App.4th 993, 1002, fn. omitted.) To be sure, a "use" enhancement cannot stand when the defendant was merely armed with the weapon but did not use it to aid in the commission of the crime in any way. (*Id.* at p. 1005.) "Use" is established if the defendant took some action with the weapon in furtherance of the commission of the crime. (*People v. Granado* (1996) 49 Cal.App.4th 317, 324, fn. 7 (*Granado*).) The victim need not know that the weapon is being used. (*Hajek, supra,* 58 Cal.4th at p. 1198.) The victim's state of mind has no effect on whether the defendant used the weapon. (*Granado,* at p. 326.) If the defendant intentionally deployed the weapon in furtherance of the offense, the use enhancement has been established. "To excuse the defendant from this consequence merely because the victim lacked actual knowledge of the gun's deployment would limit the statute's deterrent effect for little if any discernible reason. [Citation.]" (*Id.* at p. 327.)

Here, defendant's argument is based on the premise that A.R. did not clearly testify that defendant threatened her with the knife when he verbally threatened her if L.R. did not stop screaming, and demanded her car keys. The testimony regarding the knife was as follows: L.R. testified she ran from the room when defendant was holding the knife. A.R. testified, right before a recess in testimony, that while defendant was threatening her, he had something in his hand; she did not say what. After the recess, she clarified that when she *first* saw

defendant, she did not see anything in his hands, "but when he left, when we went out the door, I saw the knife." She did not testify that she saw him pull the knife at any point; she simply testified that she failed to see the knife when she first encountered defendant. She further testified that the knife was six inches long; and when asked if she saw defendant's shoes, agreed that she did not because she was focused on what he was saying and the knife that was in his hand. This testimony is sufficient to establish defendant used the knife. It is reasonable to infer that defendant had the knife in his hand when he chased L.R. from the room and encountered A.R. in the hallway. He continued to have the knife in his hand when he threatened to kill A.R. and demanded her property, and this was the "something" he had in his hand. A.R. later saw the knife well enough to know its length, and she further testified that she focused on defendant's threats and the knife.

Although A.R. testified that she did not immediately see the knife, this does not mean defendant was not holding the knife in his hand when he threatened A.R. and demanded her keys. Indeed, it would be unreasonable to infer that defendant threatened L.R. with a knife, conveniently put the knife away while threatening A.R., and then happened to pull the knife again when he was making his retreat from the house. That A.R. did not see the knife at first does not mean defendant was not using it; indeed, as we have discussed above, A.R. did not have to see the knife at all for the use enhancement to be true. What matters is that the evidence supports the conclusion that defendant had the knife in his hand while he threatened A.R. and demanded her property, intentionally underlining the seriousness of his threats.

2. *Sentencing Issues*

The parties each raise a sentencing issue; we have raised a third.

A. *Defendant's Custody Credits Were Properly Calculated*

Defendant was arrested on November 26, 2015 and sentenced on May 22, 2017. He was awarded 544 days actual presentence credit and 81 days (15%) of conduct credits. On appeal, defendant initially argued that he was entitled to 545 days of actual credit instead of 544. In its respondent's brief, the prosecution challenged defendant's math; and in his reply brief, defendant conceded the issue. We have confirmed that the trial court's calculation was correct.

B. *The Fees Were Properly Calculated*

In imposing sentence, the trial court imposed a $30 criminal conviction assessment and a $40 court operations fee on each count of which defendant was convicted, amounting to $90 in criminal conviction assessments and $120 in court operations fees. In its respondent's brief, the prosecution argues that these fees should have been imposed on each of the four counts of which defendant was convicted. But defendant was convicted of only three counts; the prosecution overlooks defendant's acquittal of the count of attempted robbery of L.R. The trial court's imposition of fees was correct.

C. *The Concurrent Sentence on Attempted Robbery Must Be Corrected*

Defendant was sentenced to 13 years for the burglary of L.R. He was sentenced to a concurrent term of 13 years for the attempted robbery of A.R. This was calculated as the high term of 6 years, doubled for the strike, plus an additional year for the

knife enhancement. Unlike a conviction for a completed robbery, the robbery charge here was only attempted robbery. Six years is the high term for robbery (Pen. Code, § 213, subd. (a)(1)(B)); defendant was convicted of attempted robbery which, under the circumstances of this case, is punished by incarceration for 16 months, 2 years, or 3 years. (*People v. Epperson* (2017) 7 Cal.App.5th 385, 391.) As such, defendant's concurrent sentence on attempted robbery should have been the high term of 3 years, doubled for the strike, plus an additional year for the knife enhancement, for a total of 7 years. We sought additional briefing on this issue, and the prosecution concedes the error and agrees to the new computation of defendant's sentence. We will modify the sentence accordingly.

**DISPOSITION**

The concurrent sentence on count 4, attempted robbery, is modified to a concurrent high term of three years, doubled, with an additional year for the weapon enhancement. The trial court is directed to prepare an amended abstract of judgment reflecting the modified sentence and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J. HALL, J.*

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