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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. VINCENT LAMONT HEARD, Defendant and Appellant.	B281075 (Los Angeles County Super. Ct. No. TA136370)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura R. Walton, Judge. Affirmed in part and vacated and remanded in part.

Adrian K. Panton, 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, Paul M. Roadarmel, Jr., and John R. Prosser, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Vincent Lamont Heard appeals from the judgment of his convictions of assault with a semi-automatic firearm in violation of Penal Code section 245, subdivision (b).[1] Appellant argues that the court erred when it instructed the jury with a pinpoint instruction, stating "[i]n determining how a reasonable person would act, you cannot consider as a circumstance a mental state unique to the defendant which affected his ability to perceive the situation." He complains that the instruction was misleading and invited the jury to ignore evidence regarding his defense of accident—that appellant lacked the intent to discharge the firearm. As we shall explain, we disagree. Notwithstanding our conclusion on the claim of instructional error, we remand this matter for resentencing in light of the Legislature's recent amendment to the law regarding imposition of handgun enhancements. (§ 12022.5.)

FACTUAL AND PROCEDURAL BACKGROUND

On January 26, 2015, appellant's aunt observed appellant engaged in unusual behavior—laughing out loud, talking to himself, giggling, and holding his head down and mumbling. Appellant's aunt convinced him to seek out a psychological evaluation and treatment at Exodus Foundation for Recovery (Exodus), a mental health clinic in Compton, and they went together to the facility that afternoon. Unbeknownst to everyone, appellant had tucked a loaded firearm under his clothes in his waistband, and he carried the weapon into the clinic; appellant stated that he brought the gun because at the time he was delusional and believed that his neighbors and family members were trying to kill him.[2]

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

[2] Appellant went to Exodus because he was having delusions. He recalled seeing aliens, demons, angels, and a space craft.

After he had checked in at the clinic, appellant and his aunt met with a psychiatric nurse practitioner, who concluded appellant was paranoid and psychotic. Appellant became more anxious and agitated during the interview and the nurse determined that appellant should remain at the facility overnight. During his interview, appellant revealed that he had a gun, and the nurse summoned security.

Two security officers and a mental healthcare worker, Jorge Contreras, responded to the interview room. The nurse told them to take appellant for further observation and evaluation. Appellant did not want to stay at the clinic. He wanted to obtain medication and leave with his aunt. At the time he thought the security officers were aliens that were going to take him to Mars.

According to the security officers, appellant became more agitated and balled his hands into fists, as his aunt was escorted out of the room. As appellant tried to leave the room, a struggle ensued between appellant and the security officers. One of the officers grabbed appellant and hooked his arms under appellant's arms. As the officer was attempting to subdue him, appellant got an arm free, pulled out the gun from his waistband and shot Contreras in the leg. The officer and appellant then fell against a wall and then to the floor. The police were summoned, and they took appellant into custody.

According to appellant, he did not intend to harm anyone, and the discharge of the firearm was an accident. Appellant testified that when he tried to leave the interview room, a security officer blocked his path. He stated that he intended to give the officer the loaded weapon and therefore pulled the gun out from his clothing because he knew the officer would search him and find it and appellant did not want either of them to be accidentally shot as the gun was removed from appellant's waistband. But before he could hand the gun over, appellant stated that the security officer

grabbed him and pushed him up against a wall. While appellant was facing the wall, he stated that he attempted to hand his gun to the officer, but the officer threw appellant to the floor. And as appellant fell to the floor, he heard the gun discharge. Appellant could not recall pulling the trigger.

In the written statement appellant gave to authorities after his arrest, appellant stated: "I had the gun in my waistband and I pulled the trigger to get him off me. I wanted to get the security guards off me, and the gun was given to me by my homie."

An information charged appellant in counts 2, 3, 4, and 5 with assault with a semi-automatic firearm in violation of section 245, subdivision (b), and a serious felony under section 1192.7, subdivision (c)(8). The information further charged the personal infliction of great bodily injury (§ 12022.7, subd. (a)) and the personal use of a firearm (§ 12022.5, subd. (a)) for each count.[3]

When the court and the parties discussed the jury instructions, the court indicated that it would instruct with CALCRIM No. 875, which defines the crime of assault with a semiautomatic firearm in violation of section 245, subdivision (b) as follows:

1. The defendant did an act with a semi-automatic firearm that by its nature would directly and probably result in the application of force to a person;

2. The defendant did that act willfully;

3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; and

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[3] After the presentation of evidence, the trial court granted appellant's motion for acquittal (§ 1118.1) on the great bodily injury allegation (§ 12022.7, subd. (a)) as to counts 2, 3, and 5).

4. When the defendant acted, he had the present ability to apply force with a semi-automatic firearm to a person; and

5. The defendant did not act in self-defense.

And because the jury had heard evidence of appellant's delusional mental state shortly before the shooting, the prosecution requested, and the court agreed, over appellant's objection, to supplement CALCRIM No. 875 with a pinpoint instruction, clarifying the "reasonable person," standard, which stated: "In determining how a reasonable person would act, you cannot consider as a circumstance a mental state unique to the defendant which affected his ability to perceive the situation."

Also, the court also instructed the jury on the general intent using CALCRIM No. 250: "For you to find a person guilty of the crimes in this case . . . that person must not only commit the prohibited act . . . but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act." At appellant's request, the court also instructed the jury on his theory that the gun discharged on accident, and that appellant did not intend to harm anyone, pursuant to CALCRIM No. 3404. The court stated: "The defendant is not guilty of [a]ssault with a [s]emiautomatic [f]irearm or [a]ssault with a [f]irearm if he acted or failed to act without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty . . . unless you are convinced beyond a reasonable doubt that he acted with the required intent."

The jury returned guilty verdicts on counts 2, 4, and 5 with a true "personal use [of] a firearm" finding made as to each count. (§ 12022.5, subd. (a).) In addition, the jury found true that appellant had inflicted "great bodily injury" related to count 4. (§ 12022.7, subd. (a).) The jury returned not guilty verdicts on count 3 and the lesser included offense of assault with a firearm.

The court sentenced appellant to a total state prison term of nine years.[4] Appellant timely filed a notice of appeal.

While this appeal was pending, appellant filed a motion seeking leave to file a supplemental brief based upon a recent amendment to section 12022.5, which permits the trial court to strike a firearm enhancement that would otherwise be imposed under that statute. (§ 12022.5, subd. (c); Stats. 2017, ch. 682, § 1.) We granted the motion and invited the parties to file a response and a reply. In his supplemental brief, appellant contends that the amendment to section 12022.5 should apply retroactively to him and that the case should be remanded to the trial court to permit that court to exercise its discretion under the amendment. The Attorney General concedes the point.

DISCUSSION

A. The Court Did Not Commit Instructional Error.

Appellant argues that the court erred in giving the "reasonable person" pinpoint instruction because it misled the jury, inviting the jury to ignore the evidence that he did not intend to fire the weapon. As we shall explain, we disagree.

When a criminal defendant asserts instructional error, our standard of review is de novo. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 274–280.) The court asks whether there is a

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[4] The trial court imposed nine years on count 4, comprised of the low term of three years, plus three years for the great bodily injury enhancement (§ 12022.7, subd. (a)), and three years for the personal use of a firearm enhancement (§ 12022.5, subd. (a)). As to counts 2 and 5, the trial court imposed six years in state prison, comprised of the low term of three years, plus three years for the personal use of a firearm enhancement (§ 12022.5, subd. (a)), to be served concurrently to count 4.

reasonable likelihood the jury understood the challenged instruction in a way that violates the Constitution. (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.) The determination is based on " 'the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction' " viewed in isolation. (*People v. Carrington* (2009) 47 Cal.4th 145, 192.) "Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' " (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) " 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible [of] such interpretation.' " (*Ibid.*) And we assume the jurors are intelligent persons capable of understanding and correlating all jury instructions given them. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1321.) Any potential for confusion in instructions may be reduced by an appropriate closing argument. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220, overruled in part on another point by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

Here, when reviewed in the context of the other instructions, there is no reasonable likelihood that the jury applied the instruction in the manner appellant suggests—that they interpreted it as a suggestion to ignore the evidence appellant presented on his accident defense.

Preliminary, as the Attorney General points out, the pinpoint instruction accurately stated the law. (*People v. Jefferson* (2004) 119 Cal.App.4th 508, 518-520.) The purpose of this pinpoint instruction is to ensure that when appellant introduces evidence that he suffered from a delusional mental state during the commission of the crime, the reasonable person standard applied is an "objective" reasonable person—that appellant's knowledge of the situation is not viewed through the prism of his unique mental

condition, but instead viewed through the awareness of an individual of ordinary mental and physical capacity. (*Id.* at p. 519.) And "to hold otherwise would undercut the legislative provisions separating guilt from insanity. Allowing a defendant to use delusion [in this manner] permits him or her to use insanity as a defense without pleading not guilty by reason of insanity, and thus to do indirectly what he or she could not do directly while also avoiding the long-term commitment that may result from an insanity finding." (*People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437, 1456.)

In addition, the pinpoint instruction here did not implicitly or explicitly invite the jury to ignore evidence concerning appellant's intent or his claim that he accidentally discharged the weapon. The instruction had no connection to the intent element of the crime, and nothing in the instruction suggests that it related to the issue of appellant's intent. Rather, the pinpoint instruction in this case was relevant to the issue of appellant's awareness and knowledge of the situation—the third element of the assault charge, articulated in CALCRIM No. 875 as: "When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone." Indeed, the pinpoint instruction was implicitly linked to CALCRIM No. 875 through the pinpoint's use of the same and similar terms—"reasonable person" and "ability to perceive."

Appellant presented evidence that his decision to bring a loaded weapon to Exodus and his overall perception of the situation was influenced by his delusional belief that someone was trying to kill him. Thus, the pinpoint instruction guided the jury on how to assess appellant's ability to perceive the events. The prosecutor further explained the connection between the pinpoint instruction and the knowledge element of the offense. He told the jury that this

instruction related to whether appellant perceived the danger of the situation, and that in assessing whether appellant had the requisite awareness they should apply the objective reasonable person standard—"[w]ould a reasonable person believe that holding a gun, loaded gun and one that is ready to fire, holding it . . . in the direction where people are, could that result in force if that trigger is pulled?" In our view, the jury would not have applied the pinpoint instruction to the intent element rather than the knowledge element of the offense. Instead, the jury's assessment of appellant's intent was guided by jury instructions on his accident defense (CALCRIM No. 3404) and general intent (CALCRIM No. 250). Thus, there is no reasonable possibility that the jury would have disregarded appellant's version of the events based on that instruction.

B. The Trial Court May Strike the Firearm Enhancements in Light of a Recent Amendment to Section 12022.5.

At the time of appellant's sentencing, the trial court was required to impose the firearm enhancements under section 12022.5 when applicable. Accordingly, the court imposed a three-year sentence enhancement under section 12022.5 on his base term, count 4, and the same enhancement to his two concurrent terms, counts 2 and 5.

While this appeal was pending, the Legislature amended that statute to provide that 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." (§ 12022.5, subd. (c); Stats. 2017, ch. 682, § 1.)[5] The

[5] Under section 1385, the court "may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed,"

amendment went into effect on January 1, 2018. (See Cal. Const., art. IV, § 8, subd. (c).) Appellant contends, because his judgment is not final, the statute should be applied retroactively to permit the trial court to strike his firearm enhancements. We agree.

Generally, amendments to the Penal Code do not apply retroactively. (See § 3.) Our Supreme Court, however, has recognized an exception for amendments that reduce the punishment for a specific crime. (See *In re Estrada* (1965) 63 Cal.2d 740, 745; accord, *People v. Brown* (2012) 54 Cal.4th 314, 323-324.) The *Estrada* court explained that when the Legislature has reduced a crime's punishment, it has "expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act." (*In re Estrada*, *supra*, 63 Cal.2d at p. 745.) The court inferred that "the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Ibid*.) To "hold otherwise," the court concluded, "would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*Ibid*.)

The Supreme Court has extended the *Estrada* holding to amendments that do not *necessarily* reduce a defendant's punishment, but which give the trial court discretion to impose a lesser sentence. (*People v. Francis* (1969) 71 Cal.2d 66, 75-76; see also *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 308 [" 'in the absence of contrary indictations, a legislative body

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and, generally, "to strike or dismiss an enhancement" or "strike the additional punishment for that enhancement." (§ 1385, subds. (a) & (c); see *People v. Meloney* (2003) 30 Cal.4th 1145, 1155.)

ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible' "].)

The amendment to section 12022.5 provides courts with discretion to strike or dismiss the firearm enhancements—and thereby reduce the punishment—that would otherwise be imposed under that statute. As the Attorney General concedes, appellant should, therefore, receive the benefit of the new law. Accordingly, upon remand, the court should have the opportunity to exercise its discretion to strike the firearm enhancements.

DISPOSITION

The sentence enhancements imposed under Penal Code section 12022.5, subdivision (a) on the convictions for counts 2, 4, and 5 are stricken. Upon remand, the trial court shall hold a sentencing hearing to consider whether, pursuant to Penal Code section 12022.5, subdivision (a), to strike or dismiss an enhancement otherwise required by Penal Code section 12022.5. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur.

CHANEY, J. BENDIX, 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.